

82-1273

No. _____

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF MAINE,
Petitioner

v.

RICHARD THORNTON,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE MAINE SUPREME JUDICIAL COURT CORRECTLY CONSTRUE THE FOURTH AMENDMENT BY HOLDING THAT THE "OPEN FIELDS DOCTRINE" OF HESTER V. UNITED STATES, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), WAS INAPPLICABLE TO THE INSTANT CASE, WHEREIN A WARRANTLESS SEARCH OCCURRED IN A HEAVILY WOODED AREA OF MR. THORNTON'S 38-ACRE RURAL PROPERTY WHICH WOODED AREA IS BEYOND THE CURTILAGE OF AND NOT VISIBLE FROM MR. THORNTON'S HOUSE, JUST BECAUSE NO TRESPASSING AND NO HUNTING SIGNS, AN OLD STONE WALL, AND AN OLD BARBED WIRE FENCE DOT THE PERIMETER OF MR. THORNTON'S PROPERTY?

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton, Decision No. 3103 (Decided December 6, 1982), denying the State's appeal from a Maine Superior Court order suppressing marijuana seized from Mr. Thornton's property, is not yet officially reported and is reproduced in Appendix A to this Petition. The Maine Superior Court suppression order is reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton, Decision No. 3103 (Decided December 6, 1982), was entered on December 6, 1982, and the Court's mandate was issued on the same day. Petitioner has timely filed this petition for a writ of certiorari

within the sixty-day filing period set forth in U.S.Sup.Ct. Rule 20.1.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the basis of an informant's tip received on July 31, 1981 that marijuana was growing in a heavily wooded area behind a mobile home on the Davis Corner Road in Hartland, Maine (S.H.T. at 6-7)¹, Maine

¹References to pages of the court reporter's transcript (Rule 39(b), Maine

State Police Trooper Carroll E. Crandall and Hartland Constable Harold Hartford drove to the mobile home on August 3, 1981 between approximately 10:00 a.m. and 11:00 a.m. (S.H.T. at 16), parked their automobile in front of the mobile home (S.H.T. at 11), and walked between the mobile home and a house occupied by Linwood Leavitt to the heavily wooded area immediately behind the two residences. (S.H.T. at 6-7, 9, 23, 27, 32 (Trooper Crandall); 57-59 (Constable Hartford)). At this point the officers saw and followed a footpath into the heavily wooded area until they came across a clearing near the footpath wherein marijuana plants were growing in two patches. (S.H.T. at 7, 9-10, 12, 23, 32 (Trooper Crandall); 39, 42 (Linda Thornton); 58-59 (Constable Hartford)). Chicken-wire

Rules of Criminal Procedure) of the hearing held April 5, 1982 in Maine Superior Court (Somerset County) on Mr. Thornton's motion to suppress shall be in parentheses as follows: (S.H.T. at ____).

fencing, approximately three to four feet high, enclosed each of the marijuana patches. (S.H.T. at 7, 17-18 (Crandall); 43-46 (Linda Thornton)). It was possible to see the marijuana plants by looking through as well as over the fencing. (S. H.T. at 7, 17-18 (Crandall); 54 (Linda Thornton)). Upon finding and observing the marijuana patches, the officers retraced their route back to their automobile. (S.H.T. at 25, 27). In walking to and from the marijuana patches, the officers did not see or come across any No Trespassing or No Hunting signs, fences, stone walls, or other indications that they were walking across property boundary lines. (S.H.T. at 11-12, 21, 35 (Crandall); 59 (Hartford)). However, Trooper Crandall did suspect that the marijuana patches were located on the property of Richard Thornton. (S.H.T. at 11-12).

After the officers returned to their vehicle, Trooper Crandall went to the Town Office in Hartland where, after examining the town property maps, he was able to determine that the marijuana patches were located on the property of Richard Thornton. (S.H.T. at 13). After securing a search warrant for which the probable cause was established at least in part by the officers' warrantless observation of the marijuana plants on Mr. Thornton's land, Trooper Crandall along with several other law enforcement officers returned to Mr. Thornton's house on August 3, 1981, gave Mrs. Linda Thornton - wife of Richard Thornton (S.H.T. at 37) - a copy of the search warrant (S.H.T. at 48-49), and walked back into the heavily wooded area behind Mr. Thornton's house to the two marijuana patches. The marijuana patches, located approximately 500 feet from the Thornton house and surrounded

by forest, were not visible from the Thornton house. (S.H.T. at 10-11, 17, 31 (Crandall); 55 (Linda Thornton)). On account of the forest on the Thornton's mostly wooded 38-acre rural property (S.H.T. at 38, 39, 40-41, 54 (Linda Thornton)) the two marijuana patches could also not be seen from the Thornton's driveway, the Davis Corner Road, or the property of the Thornton's neighbors. (S.H.T. at 44). The law enforcement officers seized 151 marijuana plants from the two marijuana patches and returned to Mr. Thornton's driveway by way of a footpath running from the patches to the driveway. (S.H.T. at 10-11, 27, 29-30).

On August 11, 1981, Richard Thornton was charged by complaint with unlawfully furnishing scheduled 2 drugs in violation of 17-A Maine Revised Statutes Annotated (M.R.S.A.) §1106. On February 23, 1982,

Respondent Thornton filed in Maine Superior Court (Somerset County) a motion "to suppress for use as evidence the observations made and property seized by law enforcement officers at the Defendant's property on August 3, 1981." The Respondent's motion was based in part on the following contentions: "1. There was an illegal search of Defendant's property; 2. The observations were made and the property was seized without a valid warrant...." A hearing on Respondent's motion to suppress was held April 5, 1982 in Maine Superior Court (Somerset County) before Superior Court Justice Morton A. Brody. At the outset of the hearing Petitioner State of Maine (1) stated that the first issue raised by Respondent's motion to suppress was "whether the Fourth Amendment applies at all, on the open field issue" and (2) was unwilling to stipulate that the warrantless visit of Trooper Crandall and Con-

stable Hartford to Thornton's property on the morning of August 3, 1981 as a "search" under the Fourth Amendment. (S. H.T. at 2). In Petitioner's closing argument at the end of the suppression hearing Petitioner reiterated that the warrantless entry by Trooper Crandall and Constable Hartford onto Respondent's property was in a rural wooded area beyond the curtilage of Respondent Thornton's house where Respondent had no reasonable expectation of privacy and that the warrantless entry was therefore "a permissible open field type of search" authorized by Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), and not governed by the Fourth Amendment. (S.H.T. at 60, 66-67).

Rejecting Petitioner's argument, the Superior Court Justice noted that "[t]he perimeter of the Thornton property was posted with a number of signs prohibiting trespassing and hunting." (The Superior

Court Justice's "ORDER" dated April 9, 1982, is included as Appendix B to this petition.) This finding was based on Linda Thornton's testimony at the suppression hearing that approximately ten No Trespassing-No Hunting signs were posted around the perimeter of the Thornton property. (S.H.T. at 41-43). Mrs. Thornton also testified that an old stone wall and an old barbed wire fence "go all the way around the property" (S.H.T. at 41); however, on cross-examination Mrs. Thornton acknowledged that in places the old stone wall had broken down and fallen into pieces. (S.H.T. at 52-53). The Superior Court Justice nevertheless concluded:

As is evident from the secluded location chosen for his horticultural enterprise, the defendant had no intent to expose the enclosures to either public or police view. The intent to avoid casual public view, and the efforts taken to generally exclude the public from his wooded property, indicates the defendant had a reasonable expectation of privacy thereon. The

officers were not innocently upon any property open to the public (the footpath or tote road was evidently not a public way), or in an area in which ownership of the land was unknown. Neither were the officers lawfully upon any neighboring property when they discovered the marijuana; such a view was impossible from adjacent land. The Court does not find that either the plain view or open fields exception to the warrant requirement is applicable. (The extent to which the open fields doctrine is still viable after Katz v. United States, 389 U.S. 347 (1967) is open to considerable doubt. See, generally W. LaFave, Search & Seizure § 2.4 (1978)).

On appeal to the Supreme Judicial Court of Maine Petitioner contended once again that the "open fields doctrine" of Hester v. United States permitted the August 3rd warrantless entry into the wooded area behind Mr. Thornton's house, especially since Mr. Thornton lacked a reasonable expectation of privacy in the wooded area because the wooded area was well beyond the curtilage of Mr. Thornton's house. Petitioner also contended that the "reason-

able expectation of privacy" analysis set forth in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), does not diminish the continuing viability of Hester's "open fields doctrine."

Petitioner additionally argued that the following three statements in the Superior Court Justice's "Order" dated April 9, 1982, were clearly erroneous:

- (1) "The perimeter of the Thornton property was posted with a number of signs prohibiting trespassing and hunting."
- (2) "In entering upon the Thornton property on July 31, 1981, the two officers went partly up the driveway from the Davis Corner Road...."
- (3) "In entering upon the Thornton property on July 31, 1981, the two officers ... crossed a stone wall in disrepair into the woods, encountering the footpath, which they followed away from the direction of the house to the location where they believed the marijuana to be growing."²

² Although not challenged on appeal, the Superior Court Justice's finding that

Addressing initially Petitioner's three challenges to the Superior Court Justice's findings of fact, the Maine Supreme Judicial Court stated that the above-quoted first and third findings of fact were not clearly erroneous. In regard to the above-quoted second finding of fact, the Maine Supreme Judicial Court stated in pertinent part:

The suppression court's finding, even if erroneous, was, however, harmless error. M.R.Crim.P., Rule 52(a); State v. True, Me., 438 A.2d 460, 467 (1981) (preserved error harmless if 'appellate Court believes it highly probable that the error did not affect the judgment'). Even absent this finding, there was sufficient evidence to support the justice's conclusions that the officers were not properly on property open to the public, were not on property of

Trooper Crandall and Constable Hartford made their warrantless entry onto Mr. Thornton's property on July 31, 1981 is clearly erroneous. Both the transcript of the suppression hearing and Trooper Crandall's "AFFIDAVIT AND REQUEST FOR SEARCH WARRANT" make clear that the officers' warrantless entry occurred on August 3, 1981 - the same day that Trooper Crandall applied for, received, and executed the search warrant.

unknown ownership, and were not lawfully on neighboring property. This evidence included the findings that the property was posted and surrounded by a wall; that Crandall "figured" the marijuana was on the defendant's property; that Crandall had seen marijuana on the defendant's property in 1980; that Crandall wanted to check the property in order to get more information for the warrant; and that the marijuana patches could not be seen from neighboring land.

Addressing Petitioner's contention that the "open fields doctrine" of Hester v. United States permitted the August 3rd warrantless entry into the wooded area behind Mr. Thornton's house, the Maine Supreme Judicial Court acknowledged that Katz's "reasonable expectation of privacy" analysis does not diminish the viability of Hester's "open fields doctrine" but nevertheless concluded that Mr. Thornton had a reasonable expectation of privacy in the marijuana patches.³ In support of this

³Significantly, the Maine Supreme Judicial Court cited State v. Brady, Fla. App., 379 So.2d 1294, 1295 (1980), for the

conclusion, the Maine Court noted that
Mr. Thornton

chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO U.S. SUP. CT. RULE 17.1(c) BECAUSE THE MAINE SUPREME JUDICIAL COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The issue decided by the Maine Supreme Judicial Court in this case, i.e., whether Hester's "open fields doctrine" applies to fenced and posted property located beyond

following propositions: (1) "Katz did not rule out the open fields of Hester altogether," and (2) "the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out."

the curtilage of a home, is an important unresolved question of federal law. It is the same issue that has been presented for review by the State of Florida's petition for certiorari in Florida v. Brady, U.S. Supreme Court Docket No. 81-1636.⁴ Both

⁴The Florida petition presents the following specific question for review:

Whether the Florida Supreme Court correctly construed the Fourth Amendment to the United States Constitution by holding that the "open fields doctrine" of Hester v. United States, 265 U.S. 57 (1924) was inapplicable to the instant case, where contraband was seized from an 1,800 acre open field, just because the field was barbed wire fenced, locked, and posted?

This question is virtually identical to the question presented for review in the instant petition, namely:

Did the Maine Supreme Judicial Court correctly construe the Fourth Amendment by holding that the "open fields doctrine" of Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), was inapplicable to the instant case, wherein a warrantless search occurred in a heavily wooded area of Mr. Thornton's 38-acre rural property which wooded area is beyond the curtilage of and not visible from Mr. Thornton's house,

the importance and the unresolved status of this federal issue are suggested by the fact that the State of Florida's petition for certiorari was granted by the United States Supreme Court on May 24, 1982.

Florida v. Brady, 102 S.Ct. 2266.

The issue presented by this petition is important because the Fourth Amendment should not be interpreted - as the Maine Supreme Court has interpreted it in State of Maine v. Richard Thornton - to permit people to invoke its protections for illicit activities conducted beyond the curtilage of their homes by simply posting and fencing their property. In his concurring opinion in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), Mr. Justice Harlan stated that the application of Fourth Amendment protections rests on a

just because No Trespassing and No Hunting signs, an old stone wall, and an old barbed wire fence dot the perimeter of Mr. Thornton's property?

two-pronged analysis: "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361, 19 L.Ed.2d at 588. In light of Justice Harlan's two-pronged test, simply because a person has fenced and posted his property located beyond the curtilage of his home and thereby manifested a subjective expectation of privacy does not convert an otherwise open field or rural forest into an area protected by the Fourth Amendment unless either society is prepared to recognize that subjective expectation as reasonable or there are additional circumstances which convert that subjective expectation into one that is objectively reasonable. Petitioner submits that on the facts of the instant case, wherein only approximately ten No Trespassing-No Hunting

signs were posted around the perimeter of Mr. Thornton's mostly wooded 38-acre rural property bounded in some places by an old broken-down stone wall and in others by an old barbed wire fence, Mr. Thornton's subjective expectation of privacy in his property, which was based completely on this posting and fencing, is not one that society is prepared to recognize, and should not be required by the courts to accept, as objectively reasonable.

That Trooper Crandall and Constable Hartford may have committed a trespass by their August 3rd warrantless entry onto Mr. Thornton's property does not somehow bring the marijuana patches within the scope of Thornton's Fourth Amendment protections. In Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), the Supreme Court recognized that the law enforcement officers in that case may have committed a trespass by their warrantless

entry onto what may have been Hester's father's land. The alleged trespass was irrelevant, however, to determining whether the officers had committed any Fourth Amendment violations because the critical issue was whether the Fourth Amendment even applied to the open fields. The Court concluded that it did not on the ground that the distinction between open fields and the "houses" protected by the Fourth Amendment "is as old as the common law. 4 Bl.Com. 223, 225, 226." 265 U.S. at 58-59, 68 L.Ed. at 900. By acknowledging the historical basis of this distinction, the Supreme Court implied what it would state expressly in dictum a year later, i.e.,

The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543, 549 (1925).

The implication in Hester is that the Fourth Amendment does not apply to areas beyond the curtilage of the home, even posted areas on which law enforcement officers would be committing a knowing trespass by entering, simply because the special protections of the Fourth Amendment were not intended at the time of the Amendment's adoption to extend to open fields or rural woods.

U.S.Sup.Ct. Rule 17.1(c) states that one reason considered by the Supreme Court in deciding to grant a petition for certiorari is:

[w]hen a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court....

The relationship of Hester's "open fields doctrine" (i.e., the Fourth Amendment does

not apply to open fields) to Katz's "reasonable expectation of privacy" test (i.e., the Fourth Amendment applies to wherever there is a reasonable expectation of privacy) in regard to posted and fenced fields or woods beyond the curtilage of the home - the very relationship addressed by the Maine Supreme Judicial Court in the instant case - is an important and unsettled area of Fourth Amendment law requiring clarification by the Supreme Court of the United States. The instant petition should be granted because it presents this issue for review.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO U.S. SUP. CT. RULE 17.1(b) BECAUSE THE MAINE SUPREME JUDICIAL COURT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A FEDERAL COURT OF APPEALS.

That the Fourth Amendment issue decided by the Maine Supreme Judicial Court in State of Maine v. Richard Thornton has not

been settled by the United States Supreme Court is demonstrated by the conflict between the Maine Court's opinion and the decision in United States v. Oliver, 686 F.2d 356 (6th Cir. 1982), wherein the Sixth Circuit, on a set of facts similar to Thornton, arrived at the opposite conclusion. Oliver entailed a warrantless entry by Kentucky State Police into a large fenced and posted farm area in which marijuana plants were found growing in secluded fields located approximately one and a half miles from Mr. Oliver's house. 686 F.2d at 358, 362. These secluded fields were bounded on all sides by woods, fences, and embankments. 686 F.2d at 362. Moreover, as in Thornton, the marijuana fields could not be seen by anyone standing on land other than Oliver's. 686 F.2d at 358, 362-63.

On these facts the Sixth Circuit held - in direct contrast to the Maine Supreme

Judicial Court's decision in Thornton - that Oliver did not have a reasonable expectation of privacy in the marijuana fields, notwithstanding their secluded location in a fenced and posted farm area. Quoting that portion of Justice Harlan's concurring opinion in Katz v. United States wherein Justice Harlan set forth his two-pronged "reasonable expectation of privacy" analysis for application of the Fourth Amendment, the Sixth Circuit then concluded "that under Hester and Katz any expectation of privacy that an owner might have with respect to his open field is not, as a matter of law, an expectation that society is prepared to recognize as reasonable." 686 F.2d at 360 (emphasis in original). A little later in its decision the Sixth Circuit stated: "The legal principles that protect privacy, therefore, do not protect the desert island, the mountain top or the open field - even one the owner has posted

with a 'no trespass' sign." 686 F.2d at 360. The Oliver decision, embodying a per se rule that an open field - even a secluded, fenced and posted one - inherently falls outside the scope of Fourth Amendment protections, is therefore in direct conflict with the Thornton decision wherein the Maine Court held that Mr. Thornton had a reasonable expectation of privacy in the wooded area containing his marijuana patches, and was therefore entitled to Fourth Amendment protections, because he had fenced and posted his property and grew his marijuana in a secluded location where the patches were observable only from his land.

U.S.Sup.Ct. Rule 17.1(b) states that one factor considered by the Supreme Court in deciding to grant a petition for certiorari is:

[w]hen a state court of last resort has decided a federal

question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

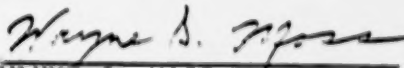
The instant petition should be granted because it entails a case where this factor is present, largely because the Fourth Amendment issue involved here has not yet been settled by the Supreme Court.⁵

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Dated: January 28, 1983

Respectfully submitted,



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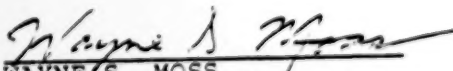
⁵ The unsettled nature of this Fourth Amendment issue is reflected in the 5-4 split among the Sixth Circuit justices, sitting en banc, in United States v. Oliver.

CERTIFICATE OF SERVICE

I, Wayne S. Moss, Assistant Attorney General, hereby certify that I have caused three (3) copies of the foregoing "Petition for a Writ of Certiorari" to be served upon Donna Zeegers, Esquire, Respondent's Attorney of Record, by depositing them in the United States Mail, postage prepaid, addressed as follows:

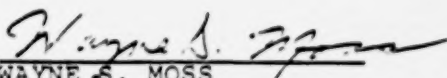
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Dated at Augusta, Maine, this 28th day
of January, 1983.


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The single party to this proceeding
required to be served, i.e., Respondent
Richard Thornton, has been served.

Dated: January 28, 1983


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APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of
Decisions
Decision No.
3103
Law Docket
No. Som-82-173

STATE OF MAINE

v.

RICHARD THORNTON

Argued September 22, 1982
Decided December 6, 1982

Before MCKUSICK, C.J., and GODFREY, NICHOLS,
ROBERTS, CARTER, VIOLETTE, and WATHEN, JJ.

CARTER, J.

The defendant was charged with unlawfully furnishing scheduled drugs in violation of 17-A M.R.S.A. § 1106 (1981). The defendant filed a motion to suppress the observations made and the items seized at the defendant's property by the police. After a suppression hearing in Superior Court (Somerset County), the justice granted the defendant's motion. The State appeals, pursuant to 15 M.R.S.A. § 2115-A (Supp.

1979) and Rule 37B, M.R.Crim.P., the suppression order. We deny the appeal.

An unidentified informant contacted Hartland Constable Arnold Hartford. The informant stated that he had been in a wooded area off the Davis Corner Road and had seen what he thought was marijuana growing in back of a mobile home in the area. Hartford contacted State Trooper Crandall. Both officers talked to the informant, who did not want to be involved in any prosecutorial activity and who did not know who owned the property on which the marijuana was growing.

On July 31, 1981, Trooper Crandall and Constable Hartford left the Davis Corner Road and walked across the property¹ between

1. At the hearing, defense counsel tried to elicit testimony from both Crandall and Hartford that they had told counsel during telephone conversations that they had walked up the defendant's driveway to approach the patches. Crandall denied making that statement; Hartford initially did not remember but later denied making the statement.

the mobile home and an adjacent house until they reached an overgrown woods road, used only as a footpath. The men continued up the woods road and found marijuana growing in two clearings fenced in with chicken wire. This entire area was heavily wooded, except for the two clearings for the marijuana patches; it was not possible to see the patches from the defendant's house, from his driveway, from the public road, or from neighboring land. In fact, a person would have had to search to find the way to the patches.

An old stone wall, an old barbed wire fence and No Trespassing signs exist around the perimeter of the defendant's property, including a sign where the woods road enters the defendant's property. It was, however, possible to enter the defendant's property without observing anything except the stone wall. The defendant did not let people walk routinely through his property and the

officers had no consent to enter the property on July 31, 1981. Although Trooper Crandall did not observe any boundaries or signs indicating the limits of the defendant's property, Trooper Crandall "figured" the marijuana was growing on the defendant's property because Crandall had observed marijuana on defendant's property in 1980.

After determining that the plants were marijuana, the officers left the property. Trooper Crandall checked maps at the Town Office to "find out for sure" who owned the property on which the plants were growing. On August 3, 1981, Trooper Crandall filed an affidavit and obtained a warrant to search the defendant's property for marijuana. Trooper Crandall based his belief of probable cause to search on his 1980 observations of marijuana on the defendant's property, on the July 31, 1981 observations, and on the information supplied by a "reliable, cooperating citizen." When asked by the suppression court justice why

a warrant had not been procured before the July 31, 1981 visit to the property, Trooper Crandall replied: "I didn't know exactly where the marijuana was. I didn't know whose property it was on, and I didn't feel without checking it that I had enough information." Later, on August 3, 1981, the officers returned to the clearings on the defendant's property and seized the marijuana.

In his order, the suppression court justice found that because the District Attorney had abandoned any effort to prove probable cause for the warrant based on the informant's testimony, sufficient probable cause for a valid warrant depended on Crandall's observations. The justice further found that because the District Attorney had conceded that Crandall's July 31 visit was a warrantless search, the central issue in the motion to suppress determination was whether the July 31 search came within an exception to the warrant requirement.

The suppression court justice concluded that the two officers had entered the defendant's property, which was posted with a number of signs prohibiting trespassing and hunting, by walking part way along the defendant's property and then crossing a stone wall, which was in a state of disrepair. The officers entered the property without license in order to corroborate the informant's tip. The secluded location, chosen by the defendant for the patches, and the defendant's efforts to exclude the public from his property evidenced the defendant's reasonable expectation of privacy on his property. Because the officers were not innocently on public property, property of unknown ownership, or neighboring property, and because no other exception² to

2. The burden was on the state to prove an exception to the warrant requirement. State v. Linscott, Me., 416 A.2d 255, 259 (1980); State v. Dunlap, Me., 395 A.2d 821, 824 (1978).

The five basic exceptions include: consent, Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973);

the warrant requirement was applicable, the justice found that the officers' July 31 visit to the defendant's property was an unlawful search. After finding that the information obtained in Crandall's 1980 search was stale in 1981 and may also have been obtained during an unlawful search and that the observations made during the July 31 unlawful search could not supply probable cause, the justice ruled that the warrant issued for the August 3 search and seizure was invalid. He, therefore, suppressed evidence of observations made and items seized on the defendant's property on August 3.

Incident to a lawful arrest, Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); probable cause and exigent circumstances, United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); hot pursuit, Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); and stop and frisk, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The "plain view doctrine" is not an exception to the warrant requirement. Rather, this doctrine allows the police to seize evidence in plain view, inadvertently observed by the police while lawfully searching with respect to another crime or purpose. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, reh'g denied, 404 U.S. 874 (1971).

On appeal, the State contends: (1) three of the suppression court justice's findings of fact are clearly erroneous; (2) the defendant could have had no reasonable expectation of privacy; and (3) the suppression justice erred in questioning and failing to apply the "open fields" doctrine. We disagree.

I. Findings of Fact

The State challenges as clearly erroneous three findings of fact by the suppression justice. Findings of fact supporting a suppression order by a Superior Court justice will not be set aside unless clearly erroneous. State v. Dunlap, Me., 395 A.2d 821 (1978). The justice found that the defendant's property was posted with signs prohibiting trespassing and hunting. The defendant's wife testified directly to the fact that such signs were posted on the defendant's property. The defense also offered in evidence a photograph of a No Trespassing sign on the defendant's property.

Second, the justice found that the two officers went partly up the defendant's driveway en route to the marijuana patches during the July 31 visit. In fact, the officers denied using that driveway. Evidence was introduced that they had used some driveway. The suppression justice was not compelled to accept the officer's testimony on the point, even if it was uncontradicted. Qualey v. Fulton, Me., 422 A.2d 773, 775 (1980). The suppression court's finding, even if erroneous, was, however, harmless error. M.R.Crim.P., Rule 52(a); State v. True, Me., 438 A.2d 460, 467 (1981) (preserved error harmless if 'appellate court believes it highly probable that the error did not affect the judgment'). Even absent this finding, there was sufficient evidence to support the justice's conclusions that the officers were not properly on property open to the public, were not on property of unknown ownership, and were not lawfully on neighboring property. This evidence included the findings that the property was

posted and surrounded by a wall; that Crandall "figured" the marijuana was on the defendant's property; that Crandall had seen marijuana on the defendant's property in 1980; that Crandall wanted to check the property in order to get more information for the warrant; and that the marijuana patches could not be seen from neighboring land.

Third, the justice found that the two officers crossed a stone wall in disrepair when entering the defendant's property. The defendant's wife testified that although the stone wall was dilapidated, a person would know he was going over a wall when entering the property in the area where the officers entered the property. Trooper Crandall's testimony that he did not see any fences or boundaries did not compel rejection by the suppression justice of the testimony of the defendant's wife. The finding of the justice was not clearly erroneous.

State v. McKenzie, 161 Me. 123, 134-35, 210 A.2d 24, 31 (1965) (clearly erroneous test

is that "'due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'").

II. Reasonable Expectation of Privacy

The suppression court justice found that the defendant's effort to conceal the patches and to exclude the public from his land evidenced a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The officers' warrantless search was, therefore, an unreasonable invasion of the defendant's privacy. State v. Blais, Me., 416 A.2d 1253, 1256 (1980). This violation of the defendant's fourth amendment rights also tainted the subsequent warrant and search. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The State relies on Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924); State v. Peakes, Me., 440 A.2d 350 (1982); and State v. Dow, Me., 392 A.2d

532 (1978) and argues that the defendant could not have a reasonable expectation of privacy in an area accessible to the public because fourth amendment protection does not extend to "open fields" and similar areas. The State concludes, therefore, that there was no search by the officers on July 31,³ Peakes 440 A.2d at 353; that they observed only what was "open and patent," State v. Poulin, Me., 268 A.2d 475, 480 (1970), and that these observations provided the basis for a valid search warrant used on August 3.

3. In his order, the suppression court justice stated that the District Attorney had conceded that the July 31 visit was a warrantless search and that the only issue was whether an exception to the warrant requirement applied. Although the State disputes this finding, the following exchange indicates either a concession on, or a waiver of, the issue of the occurrence of a search:

[Defense counsel]: Your Honor, the affidavit of the police officer states that he went into the property and saw the marijuana, and then got a search warrant, it is fairly clear.

[Prosecutor]: There is no question but what that happened.

The Court: You have the burden of going forward, in that event, [Prosecutor].

[Prosecutor]: Yes, Your Honor.

The State misconstrues these cases. In Katz, the Court made clear that the fourth amendment protection against unreasonable searches and seizures is a function of an individual's expectation concerning his activities and the reasonableness of those expectations: "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection... [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351, 88 S.Ct. at , 19 L.Ed.2d at 582; State v. Sweatt, Me., 427 A.2d 940, 946 (1981).

In his concurrence in Katz, Justice Harlan recognized that the majority's seeming personalization of the fourth amendment was not inconsistent with the prior cases. Citing Hester, Justice Harlan reasoned that activities conducted in the open are not

protected because even if there was an expectation of privacy, the expectation would be unreasonable. 389 U.S. at 388, 88 S.Ct. at , 19 L.Ed.2d at 588.

The Maine cases are in accord. We noted after Katz that

[t]he issue of whether government action does or does not constitute a search is now understood to depend less upon the designation of an area... than upon a determination of whether the examination is a violation of privacy on which the individual justifiably relied as secure from invasion.

State v. Gallant, Me., 308 A.2d 274, 278 (1973) (radiographic scanning by customs of official mail entering country not search); United States v. Miller, 589 F.2d 1117, 1125 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979) (no reasonable expectation of privacy because boat, like automobile, carries lesser expectation of privacy than home or office); United States v. Taylor, 515 F.Supp. 1321, 1326 (D. Me. 1981) (no reasonable expectation of privacy in film delivered to commercial establishment for developing); United

States v. Hensel, 509 F.Supp. 1376, (D. Me. 1981) (no reasonable expectation of privacy in Maine beach; "open fields" expectation applies); United States v. Balsamo, 468 F.Supp. 1363, 1378 (D. Me. 1979) (standing to contest a search depends on defendant's legitimate and reasonable expectation of privacy); Peakes, 440 A.2d at 352-53 (officer's observation of defendant's marijuana from neighbor's land not search); State v. Sapiel, Me., 432 A.2d 1262, 1266 (1981) (officer's proper entry on premises not violation of justifiable property interest; observation of evidence in plain view not search); State v. Rand, Me., 430 A.2d 808, 818 (1981) (absent exigent circumstances, fact that police are conducting official investigation does not justify intrusion on private property in breach of reasonable expectation of privacy); Sweatt, 427 A.2d at 945 (legitimate expectation of privacy in safe and contents; secrecy is not requisite for legitimate expectation of privacy); State v.

Albert, Me., 426 A.2d 1370, 1373 (1981) (any conceivable expectation of privacy with respect to car had ceased when police searched three weeks after car had left defendant's possession and control); Blais, 416 A.2d at 1256 (no search warrant required if State establishes absence of any reasonable expectation of privacy); State v. Johnson, Me., 413 A.2d 931, 933 (1980) (knowledge of dead body on premises created exigent circumstances permitting warrantless entry); State v. Littlefield, 408 A.2d 695, 697 (1979) (no search when defendant observed walking along public street); State v. Barclay, Me., 398 A.2d 794, 798 (1979) (necessary difference between search of store or dwelling house and search of ship, boat, wagon or car); State v. Dow, Me., 392 A.2d 532, 535 (1978) ("[o]pen, obvious and notorious criminal activity conducted in a public place has never been accorded constitutional protection under the fourth amendment"; warden's

observations of short lobsters open to public view not search); State v. Cowperthwaite, Me., 354 A.2d 173, 175-76 (1976) (observation of shotgun, cartridge, and hunting knife by officer standing at open door of vehicle not search); State v. Hamm, Me., 348 A.2d 268, 272 (1975) ("[t]he Court in Katz broadened the scope of fourth amendment protection to include those areas which the individual attempts 'to preserve as private'"); State v. Crider, Me., 341 A.2d 1, 4 (1975) (no invasion of privacy when police enter without force common hallway of multiple-unit dwelling in furtherance of investigation); State v. Koucoules, Me., 343 A.2d 860, 868 (1974) (search exceeding bounds of consent to search becomes invasion of privacy rendering search unreasonable); State v. Richards, Me., 296 A.2d 129, 134 (1972) (governmental rummaging about in citizen's belongings, even without purpose of seeking criminal violations, is search); State v. Stone, Me., 294 A.2d 683, 688-89 (1972) (rifle on back seat of auto-

mobile was knowingly exposed to public view; observation not unconstitutional intrusion into protected area); Poulin, 268 A.2d at 480 (observation of safe in open automobile trunk not search); McKenzie, 161 Me. at 137, 210 A.2d at 32 (not search to observe that which is open and patent).

Depending on the circumstances and the conduct of the individuals, it is entirely possible to have a reasonable expectation of privacy in a public phone booth, Katz, 389 U.S. at 348, 88 S.Ct. at , 19 L.Ed.2d at 580, and an unreasonable expectation of privacy at home. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), reh'g denied, 386 U.S. 939 (1967). In the present case, the defendant's conduct evidenced a clear expectation of privacy. He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.

It has never been the law in this State that any expectation of privacy for activity conducted in an area accessible to the public is per se unreasonable. Rather, the proper inquiry must be

[h]aving in mind the purpose to be served by the Fourth Amendment, made applicable to the states by the Fourteenth, should we not disregard such conclusory property law concept and determine the reasonableness of the police entry by responding to the following relevant inquiry, what under all the existing circumstances, if anything, wholly defeated or partially reduced under the law the reasonable expectations of privacy which the occupants... had a right to entertain?

Crider, 341 A.2d at 5. Under the circumstances of this case, we find nothing that can be taken to have wholly defeated or partially reduced the defendant's reasonable expectation of privacy except the visit by the officers to the property for the specific and admitted purpose of gathering information for a subsequently procured [s.c.] search warrant.

III. The "Open Fields" Doctrine

The State contends, finally, that (1) the suppression court justice clearly erred in apply^{ing} the "Katz expectation of privacy analysis" to this case because the case is governed by the "'open fields' doctrine analysis developed in Hester..."; and (2) the justice clearly erred in questioning the viability of the doctrine of Hester, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. In his order, the justice did observe, parenthetically, that "[t]he extent to which the open fields doctrine is still viable after Katz... is open to considerable doubt." This observation was preceded, however, by the finding that neither "the plain view or open fields exception to the warrant requirement is applicable."

We have recently noted that after Katz, the "Hester doctrine remains entirely intact" in Maine and elsewhere. Dow, 392 A.2d at 536. Regardless of his estimations of the doctrine's viability, the suppression

justice applied the law of the State and found inapplicable the "open fields" exception to the warrant requirement. His conclusion concerning the availability of this exception under these circumstances was correct.

In Maine, for the "open fields" doctrine to apply, two factual aspects of the circumstances must be considered: (1) the openness with which the activity is pursued, Peakes, 440 A.2d at 353 ("the officers observed something which was 'open and patent' to the Defendant's neighbors and their invitees"); Dow, 392 A.2d at 535 (open, obvious criminal activity conducted in public place not constitutionally protected); and (2) the lawfulness of the officers' presence during their observations of what is open and patent. Dow, 392 A.2d at 535 ("[t]he warden, who apparently had as much right to be in the parking lot as the defendants, merely observed that which

was completely open to public view..."); Peakes, 440 A.2d at 353 ("the Waldoboro officers had permission to be where they were when they saw the marijuana plants"); Stone, 294 A.2d at 689 ("without any unlawful initial intrusion into the interior of the automobile, Trooper Smith saw, as knowingly exposed to public view (even though inside the automobile) a 30 calibre carbine rifle...").

Although an activity may be observed, because, for example, it is conducted outside, the participants may still have, as in this case, an expectation of privacy. Katz, 389 U.S. at 351-52, 88 S.Ct. at , 19 L.Ed.2d at 582. Under such circumstances, the State must demonstrate the legitimacy of the officers' position of observation and the openness of the conduct in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute

a search. In the circumstances of this case, the State can demonstrate neither requirement for the application of the open fields doctrine. The defendant made every effort to conceal his activity; nothing about his enterprise was open, patent, or knowingly exposed to the public. Secondly, the officers were never legitimately on the defendant's property; they entered the defendant's land without a warrant, and within no exception to the warrant requirement, for the specific purpose of verifying information to be used, ultimately, against him.

Further, we note that the State's erroneous assumption that the fact that the scene of the criminal activity occurred in an area akin to an "open field" precludes the need for further fourth amendment analysis. The determination of a lawful search and seizure under fourth amendment analysis does not involve plugging in one

of several mutually exclusive theories or doctrines, such as the "open fields" doctrine, depending on the particular facts. Surely a determination of fourth amendment protection involves a more cohesive and reasoned approach.

Although separated by forty-three years, the Hester doctrine and the Katz doctrine can be reconciled; indeed, such reconciliation is required. Dow, 392 A.2d at 536; State v. Brady, 379 So.2d 1294, 1295 (Fla. 1980) ("Katz did not rule out the open fields of Hester altogether"). Under both analyses, the reasonableness of any subjective expectation of privacy would be questioned: "the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out." Brady, 379 So.2d at 1295. There is little doubt that the Katz majority would have agreed that Hester had no reasonable expectation of

privacy in distributing moonshine whiskey in an open field on his father's land.

Katz, 389 U.S. at 361, 88 S.Ct. at 19 L.Ed.2d at 588 (Harlan, J., concurring).

The point is not that the area of the marijuana patches was accessible to the public, Katz, 389 U.S. at 361, 88 S.Ct. at 19 L.Ed.2d at 588 (Harlan, J., concurring), or that, under different circumstances, the defendant's land might have been open woods. The dispositive point is that by his actions the defendant indicated that he expected his land to be a private place. Under these facts, we think that that expectation was reasonable. Trooper Crandall "figured" the marijuana was on the defendant's land. The two officers walked directly to the chicken-wire enclosures; it was not possible to observe the patches except from such close proximity. The officers were "checking" the property, without permission or authority, to ensure "enough information." This conduct was a

search; the State has not proved the reasonableness of this search. Linscott, 416 A.2d at 259. An unreasonable search, under every doctrine and theory, is proscribed by the fourth amendment.

The entry is:

Judgment affirmed.

All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

APPENDIX B

Date filed: April 16, 1982

STATE OF MAINE
SOMERSET, SS.

SUPERIOR COURT
CRIMINAL ACTION
Docket No. CR82-10

STATE OF MAINE)
)
 vs.)
)
RICHARD THORNTON)

ORDER

This criminal action is before the Court upon the defendant's motion to suppress the fruits of a search of his property in Hartland, Maine, conducted by law enforcement officers on August 3, 1981, pursuant to a search warrant issued that day.

At the hearing on April 5, 1982, the Court heard the testimony of the affiant officer, Trooper Carol Crandall, Constable Harold Hartford, and Linda Thornton, the defendant's wife. The affidavit indicates that, relying upon information supplied by a "reliable cooperating citizen," who claimed to have observed marijuana plants

growing in a penned area in woods behind the defendant's residence on the Davis Corner Road, Hartland, Trooper Crandall went to that area of the defendant's property on July 31, 1981 and discovered marijuana plants to be growing. Additionally, the affidavit claims that approximately one year previously, that is, in the summer of 1980, Trooper Crandall had observed marijuana growing on other locations on the defendant's property. Constable Hartford accompanied Trooper Crandall on his visit to the Thornton property on July 31, 1981.

The District Attorney, at the hearing on this motion, abandoned any claim that the informant citizen was reliable and credible enough that his information, standing alone, constituted probable cause for the warrant which issued. At any rate, no evidence as to the grounds upon which that informant's reliability or credibility could be established, or any evidence of

corroborating circumstances as to the informant's observations, appears in the affidavit or was introduced at the hearing, beyond a conclusionary allegation of reliability. Absent such support for the informant's tip, probable cause for the warrant must be based upon the observations of the affiant officer.

The central issue on this motion, then, is whether the visit by Trooper Crandall to the defendant's property on July 31, 1981, which the District Attorney concedes was a warrantless search, comes within any exception to the warrant requirement of the Fourth Amendment of the United States Constitution. The State bears the burden of proof on this issue. If no such exception is found, then the search would be unlawful, and thus tainted, and the observations made could not serve to provide probable cause for the warrant.

The evidence indicates that the wooded area where the marijuana was growing, within two fenced and cleared enclosures, was adjacent to an overgrown footpath or so-called tote road in the western part of the defendant's 30 acre, rural property. (See Defendant's Exhibit #12) The enclosures were not visible either from the public road, called the Davis Corner Road and forming part of the defendant's southern boundary, from the defendant's driveway or residence in the eastern part of the property, or from any other point outside the defendant's property, upon neighboring land. The distance from the house, which has an entrance only on the east, or driveway side, to the two enclosures in the west was at least several hundred feet. The perimeter of the Thornton property was posted with a number of signs prohibiting trespassing and hunting. In entering upon the Thornton property on July 31, 1981, the two officers went

partly up the driveway from the Davis Corner Road, and then crossed a stone wall in disrepair into the woods, encountering the footpath, which they followed away from the direction of the house to the location where they believed the marijuana to be growing. The testimony of Trooper Crandall and Constable Hartford indicates that they had no license to be on the Thornton property; their intent was to corroborate the informant's tip. As is evident from the secluded location chosen for his horticultural enterprise, the defendant had no intent to expose the enclosures to either public or police view. The intent to avoid casual public view, and the efforts taken to generally exclude the public from his wooded property, indicates the defendant had a reasonable expectation of privacy thereon. The officers were not innocently upon any property open to the public (the footpath or tote road was evidently not a public way),

or in an area in which ownership of the land was unknown. Neither were the officers lawfully upon any neighboring property when they discovered the marijuana; such a view was impossible from adjacent land. The Court does not find that either the plain view or open fields exception to the warrant requirement is applicable. (The extent to which the open fields doctrine is still viable after Katz v. United States, 389 U.S. 347 (1967) is open to considerable doubt. See, generally W. LaFare, Search & Seizure § 2.4 (1978)). The case of Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974), relied upon by the State, presents a different fact situation. There, the government pollution inspector saw plumes of smoke that were exposed to public view in the adjacent city, and then entered upon a part of the defendant's premises to which the public was not excluded in order to conduct tests.

Accordingly, the Court finds that the warrantless search of July 31, 1981 was an unreasonable and unlawful violation of the defendant's rights and the observations from it cannot provide probable cause for the subsequently issued warrant. Neither can the information obtained in the 1980 search alluded to in the affidavit provide probable cause for the warrant; that information was not only stale in 1981, but may also have been the fruit of an unlawful, warrantless search. The warrant having issued without probable cause, the search and seizure of August 3, 1981 pursuant to it was thus in violation of the defendant's Fourth Amendment rights.

The motion to suppress is GRANTED. It is hereby ORDERED and DECREED that all articles and items of evidence of every kind and description that were unlawfully seized from the property of the defendant and the defendant's premises at Hartland,

Maine, shall not be received or admitted into evidence and no testimony or comment shall be received respecting the same and they are hereby suppressed; all statements and/or admissions both oral and written that may have been made by the defendant as a result of said illegal search and seizure shall not be received or admitted into evidence and no testimony or comment shall be received respecting the same and they are hereby suppressed.

Dated: April 9, 1982

Morton A. Brody
Justice, Superior Court

No. 82-1273

Office - Supreme Court, U.S.
FILED

MAY 26 1983

ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MAINE,
Petitioner

v.

RICHARD THORNTON,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 31, 1983
CERTIORARI GRANTED APRIL 4, 1983

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NOTATION

The following decision and order have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

Decision of the Maine
Supreme Judicial Court
in State of Maine v.
Richard Thornton, decided
December 6, 1982. A1

Order of the Maine Superior
Court (Somerset County)
in State of Maine v.
Richard Thornton, dated
April 9, 1982, and filed
April 16, 1982. B1

RELEVANT DOCKET ENTRIES

MAINE DISTRICT COURT
DISTRICT TWELVE
DIVISION OF SOMERSET
CRIM. DOCKET NO. 81-4456

Date, Place & Offense-8/3/81,
Hartland, Unlawfully furnishing
scheduled 2 drugs

Plea-Not Guilty

Sentence-12/23/81 After not guilty
plea and at def's request,
ordered transferred to Superior
Court. Benoit, J.

MAINE SUPERIOR COURT
DOCKET NO. CR-82-10

01/05/82-Complaint and Appearance
Bond transferred from District
Court.

02/23/82-Motion to Suppress filed.

04/05/82-Motion to Suppress heard
before Hon. Morton A. Brody with
Edna Ordway, Court Reporter;
John Alsop, ADA; Donna Zeegers,
Esq. with Defendant. State's
Witnesses: Carol Crandall, MSP.
Defense Witnesses: Linda
Thornton; 2-Harold Hartford,
Constable. Defense Exhibits
Numbered 1 thru 14 - All Admitted.
Taken under Advice by Justice
Brody. Defendant's Memorandum
in Support of Motion to Suppress
filed by Attorney Zeegers.

04/16/82-ORDER:..... The Motion to Suppress is GRANTED. It is hereby ORDERED AND DECREED THAT ALL ARTICLES AND ITEMS OF EVIDENCE OF EVERY KIND AND DESCRIPTION THAT WERE UNLAWFULLY SEIZED FROM THE PROPERTY OF THE DEFENDANT AND THE DEFENDANT'S PREMISES AT HARTLAND, MAINE, SHALL NOT BE RECEIVED OR ADMITTED INTO EVIDENCE AND NO TESTIMONY OR COMMENT SHALL BE RECEIVED RESPECTING THE SAME AND THEY ARE HEREBY SUPPRESSED: ALL STATEMENTS AND/OR ADMISSIONS BOTH ORAL AND WRITTEN THAT MAY HAVE BEEN MADE BY THE DEFENDANT AS A RESULT OF SAID ILLEGAL SEARCH AND SEIZURE SHALL NOT BE RECEIVED OR ADMITTED INTO EVIDENCE AND NO TESTIMONY OR COMMENT SHALL BE RECEIVED RESPECTING THE SAME AND THEY ARE HEREBY SUPPRESSED. DATED APRIL 9, 1982. /s/ Morton A. Brody, Justice, Superior Court (Copies forwarded to both Counsel on April 13, 1982)

04/28/82-Notice of Appeal by the State Pursuant to 15 M.R.S.A. Section 2115-A.1 and Rule 37B, M.R. CRIM.P. FILED.

04/28/82-Approval of Attorney General for Appeal by State Pursuant to 15 M.R.S.A. Section 2115-A.5 and Rule 37B(b), M.R. CRIM.P. filed.

04/29/82-Certified copies of the
Notice of Appeal by the
State and Approval of Attorney
General for Appeal by State
and Docket Sheet, sent to
District Attorney, Law Court,
Donna Zeeger, Esq., and Edna
Ordway Court Reporter.

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. SOM-82-173

May 5, 1982-Certified copy of
notice of appeal and docket
entries filed May 3, 1982.
Approval of Attorney General
for appeal by the State filed
5/3/82.

May 14, 1982-Clerk's record and
exhibits filed. exhibits in
record.

May 24, 1982-Transcript of hearing
on motion to suppress dated
April 5, 1982 filed by Edna
Ordway, C.R.

July 7, 1982-Appellant's brief
filed.

Aug. 2, 1982-Brief and appendix
filed by defendant-appellee.

Sept. 22, 1982-Case argued. All
Justices sitting.

Dec. 6, 1982-Mandate filed. (Carter,
J.) Judgment affirmed.
Certified copy of mandate with
copy of decision to Superior
Court Clerk.

Feb. 9, 1983-Notice from the office
of the clerk, Supreme Court
of the U.S. that a petition
for certiorari has been filed.

April 7, 1983-Order Allowing
Certiorari filed April 4,
1983, filed.

STATE OF MAINE
V.
RICHARD THORNTON

MAINE DISTRICT
COURT
DISTRICT TWELVE
DIVISION OF
SOMERSET

AFFIDAVIT AND REQUEST
FOR SEARCH WARRANT

I, Carroll E. Crandall, after being duly sworn, depose and say that:

I am a Trooper for the Maine State Police and have been for four and a half years. Your affiant has received formal drug training at the Maine Criminal Justice Academy in February 1975 and the Maine State Police Academy in March of 1977. In this training I received knowledge on the appearance, composition, and effects of marijuana. I have made several seizures of marijuana resulting in arrests and convictions. I have sent samples of marijuana to laboratories for analysis and reports have come back from the chemist to show that

in fact the substance that I sent to the chemist was marijuana (Cannibis). I have the ability to accurately identify marijuana in either a growing or dried state.

On information and belief supplied by a reliable, cooperating citizen that on or about the thirty-first day of July, A.D. 1981, in Hartland, County of Somerset and State of Maine, that said citizen did observe marijuana plants growing in several areas penned in by wire mesh in a wooded area behind the residence of Richard Thornton at Davis Corner Road, Hartland, Maine.

That your affiant went to said wooded area on August 3, 1981, and discovered marijuana plants to be growing at the place and position behind the said residence as described by said reliable informant.

That you affiant made said observations by looking through said wire mesh fence (chicken wire).

That your affiant does further describe said wire mesh (chicken wire) as being approximately 2-3 feet high and that your affiant was able to look over and through said wire mesh fence and did observe numerous marijuana plants 3 to 4 ft. high growing in the ground and being cultivated upon said property. Your affiant does estimate that there are between 30 and 40 marijuana plants at said location.

That your affiant requests permission to search for marijuana in the aforementioned wooded area owned by Richard Thornton, more particularly described as a wooded area situated in back of a wood frame house of natural wood color with several outbuildings. The parcel of land is located on the

north side of the Davis Corner Road in said Hartland and bordered on the south side by the property of Linwood Leavitt and the property of Gerald Wheeler, bordered on the east side by Henry Parker, bordered on the north side by the property of Roland Reynolds and the property of Steven McNichol, and bordered on the west side by the property of Ellery Ricker.

Your affiant does reasonably believe that probable cause does exist and that the following subject, Richard Thornton, is in violation of Title 17-A Sections 1107 and 1114 of Maine Revised Statutes Annotated.

WHEREFORE, your affiant requests the court to issue a search warrant directing your affiant to conduct a search of the above-described wooded area at Davis Corner Road, Hartland, in the daytime, and that your affiant

be further directed to seize and return to the court any marijuana (cannibis) that may be located on said premises.

WHEREFORE, your affiant does further request that he be commanded to search all lands owned or occupied by the said Richard Thornton, excluding buildings and structures designed to exclude human beings. That your affiant did observe approximately one year ago evidence that marijuana was grown on other locations on the property of the said Richard Thornton. That said observation did consist of approximately one year ago your affiant observing approximately 1/4 acre of land that showed evidence that marijuana plants had been previously cultivated and harvested during the Fall of 1980.

DATED: August 3, 1981

/s/Carroll E. Crandall
Carroll E. Crandall

STATE OF MAINE

SOMERSET, SS.

Subscribed and sworn to me by
the said Carroll E. Crandall, this
third day of August, A.D. 1981, at
Skowhegan, County of Somerset and
State of Maine.

/s/Richard C. Poland
Richard C. Poland
Complaint Justice
12th District Court
Somerset Division
Skowhegan, Maine

MAINE DISTRICT
COURT
DISTRICT TWELVE
DIVISION OF
SOMERSET

SEARCH WARRANT

TO: Any officer authorized by law to
execute this Search Warrant

Affidavit(s) having been made
before me by Carroll Crandall of the
Maine State Police which affidavit is
attached hereto and incorporated by
reference herein, and as I am satisfied
that there is probable cause to believe
that grounds for the issuance of a
search warrant exist, you are hereby
commanded to search the place or person
herein described for the property herein
specified and, if the property is found,
to seize such property and prepare a
written inventory of the property
seized.

Place or person to be searched:

Wooded area behind the residence of Richard Thornton, Davis Corner Road, Hartland, Maine (More fully described in the attached affidavit) See attached affidavit of Carroll Crandall which is attached hereto and incorporated herein by reference.

Property or articles to be searched for:

Marijuana and Marijuana Plants

See attached affidavit of Carroll Crandall which is attached hereto and incorporated herein by reference.

Name of owner or occupant of place to be searched, if known to affiant:

Richard Thornton
See attached affidavit of Carroll Crandall which is attached hereto and incorporated herein by reference.

This warrant shall be executed between the hours of 7:00 A.M. and 7:00 P.M. and shall be returned, together with a written inventory, within 10 days of the issuance hereof, to the Clerk of the District Court Division of the Twelfth District of the District Court of Maine.

Issued at Skowhegan in the County of
Somerset this third day of August
A.D., 1981.

/s/ Richard C. Poland
~~District-Judge~~
Complaint Justice

MAINE DISTRICT COURT
DISTRICT TWELVE
DIVISION OF SOMERSET

STATE OF MAINE

V.

RICHARD THORNTON

Defendant (DOB _____)

(Residence Box 116,
Hartland, Maine)

COMPLAINT FOR VIOLATION OF
T. 17-A MRSA § 1106 (CLASS D)
(Unlawfully Furnishing Scheduled 2 Drugs)

/s/ Gerald R. LaPointe, Sr., being
duly sworn, deposes and says (upon
information and belief), that on or
about August 3, 1981 in the city/town
of Hartland, Somerset County, Maine,
the above named defendant did: inten-
tionally or knowingly furnish what he
knew or believed to be a scheduled
drug, to wit, marijuana, and which is,
in fact, a scheduled drug, to wit, a
scheduled 2 drug, by then and there
possessing the said marijuana with

intent to furnish, give, dispense or
otherwise transfer to another.

/s/Gerald R. LaPointe, Sr.
Complainant

Sworn to before me, August 11, 1981

/s/Barbara K. Butler
Clerk, Complaint Justice,
Judge, Pro Tem

MAINE SUPERIOR COURT
SOMERSET, SS.

STATE OF MAINE,)
Plaintiff)

V.)

RICHARD THORNTON,)
Defendant)

MOTION TO SUPPRESS

NOW COMES the Defendant, Richard Thornton, and moves this Honorable Court for an Order to suppress for use as evidence the observations made and property seized by law enforcement officers at the Defendant's property on August 3, 1981. This motion is based upon the following:

1. There was an illegal search of Defendant's property;
2. The observations were made and the property was seized without a valid warrant;

3. There was not probable cause for believing the existence of the grounds on which the warrant was issued;

4. The observations that were made and the property that was seized were not those described in a valid warrant; and

5. The warrant was illegally executed.

Dated: February 22, 1983

/s/Donna L. Zeegers
Donna L. Zeegers, Esq.
Attorney for Defendant

MAINE SUPERIOR COURT
SOMERSET, SS.

STATE OF MAINE)	NOTICE OF APPEAL BY THE
)	STATE PURSUANT TO 15
V.)	M.R.S.A. § 2115-A.1 AND
)	RULE 37B, M.R.CRIM.P.
RICHARD THORNTON))	

1. The Superior Court at Somerset County in the above-captioned matter, by pre-trial order dated April 9, 1982, suppressed for use as evidence marijuana that was seized from the property of the above-named defendant, any testimony or comments about the marijuana, and "all statements and/or admissions both oral and written that may have been made by the defendant" pursuant to the seizure of the marijuana.

2. An appeal by the State from the Superior Court's suppression order

is authorized by 15 M.R.S.A. §2115-A.1
and permitted by Rule 37B, M.R.Crim.P.

WHEREFORE, the State appeals to
the Supreme Judicial Court, sitting as
the Law Court, from the above-described
suppression order against the State in
the above-captioned matter.

This notice of appeal is accompanied
by a written approval of the Attorney
General of the State of Maine.

Dated: 4/27/82 /s/ David W. Crook
 DAVID W. CROOK
 District Attorney

MAINE SUPERIOR COURT
SOMERSET, SS.

STATE OF MAINE)	APPROVAL OF ATTORNEY
)	GENERAL FOR APPEAL BY
V.)	STATE PURSUANT TO 15
)	M.R.S.A. §2115-A.5 AND
RICHARD THORNTON)		RULE 37B(b), M.R.CRIM.P.

I, JAMES E. TIERNEY, Attorney

General of the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from the pre-trial order of the Superior Court at Somerset County, dated April 9, 1982, suppressing for use as evidence marijuana that was seized from the property of the above-named defendant, any testimony or comments about the marijuana, and "all statements and/or admissions both oral and written that may have been made by the defendant" pursuant to the seizure of the marijuana.

This written approval is given
pursuant to 15 M.R.S.A. §2115-A.5 and
Rule 37B(b), M.R.Crim.P.

Dated at Augusta, Maine, this 23rd day
of April, 1982.

/s/James E. Tierney
JAMES E. TIERNEY
Attorney General
State of Maine

MAINE SUPERIOR COURT
SOMERSET, SS.

STATE OF MAINE

V.

RICHARD THORNTON

STATEMENT OF TRANS-
MISSION OF EXHIBITS
TO LAW COURT

EXHIBITS in the above Case consist of
the Following: (If none, so state)

Defendant's Exhibits:

#1 - Affidavit and Request for
Search Warrant

#1 thru #13 - Photos

#14 - Search Warrant

Above Exhibits Retained in this Office ☐

Above Exhibits Transmitted to Law Court ☒

Date: May 13, 1982 /s/Esther L. Waters
Clerk of Courts

County of Somerset

STATE OF MAINE
V.
RICHARD THORNTON

MAINE SUPERIOR COURT
SOMERSET, SS.

Reporter's Transcript of
Hearing on Motion to Suppress

April 5, 1982

Honorable Morton A. Brody
Justice Presiding

APPEARANCES: Mr. Alsop for State
Ms. Zeegers for Defendant

[1]

April 5, 1982

MS. ZEEGERS: I have a Memorandum
of Law to submit to you. I also request
that the witnesses be sequestered in
this matter.

THE COURT: Is this under the old
rule where memorandums were not neces-
sarily to be filed with the motion?

MS. ZEEGERS: Yes, Your Honor.

* * *

THE COURT: Mr. Alsop, you may
proceed.

MR. ALSOP: Yes, Your Honor.

As I construe the

[2]

MR. ALSOP (cont'd): motion by the Defendant, there are essentially two issues here, whether the Fourth Amendment applies at all, on the open field issue, and assuming, there is also a warrant in this case, which was executed, and the second issue would be if the Court determines that the Fourth Amendment does apply, the question is whether it was a proper search without a warrant, and so forth. I believe that's it.

MS. ZEEGERS: Your Honor, I would like to get from the prosecutor now a stipulation that there was a search of this property without a warrant, before a warrant was issued, and therefore,

I believe the State has that burden of proof on that issue, and the reasons for the warrantless search.

THE COURT: Is there any question about that?

MR. ALSOP: Well, the facts are, Your Honor -- We are talking about marijuana plants here -- The marijuana plants were observed on the property, prior to the issuance of the warrant, and I am not willing to stipulate that it was a Fourth Amendment search.

MS. ZEEGERS: Your Honor, the affidavit of the police officer states that he went onto the property and saw the marijuana, and then got a search warrant, it is fairly clear.

MR. ALSOP: There is no question but what that

[3]

MR. ALSOP (cont'd): happened.

THE COURT: You have the burden of going forward in that event, Mr. Alsop.

MR. ALSOP: Yes, Your Honor.

* * *

DIRECT EXAMINATION OF CARROLL KRANDALL

BY MR. ALSOP:

Q Your name is Carroll Krandall?

A Yes.

Q And you are employed by the
Maine State Police?

A Yes.

[4]

Q For the past four and a half
years?

A Five and a half years.

Q And you were so employed on
August 3, 1981?

A Yes, I was.

Q And did you have an occasion on
August 3, 1981, to go to the
residence -- well, not the resi-
dence -- but to go to the wooded
area in Hartland and observe
marijuana plants?

A Yes, I did.

* * *

[5]

* * *

THE COURT: Well, what is the primary
issue in this case on this Motion to
Suppress?

MS. ZEEGERS: The primary issue,
Your Honor, is that the police officer
in this case got some information that
there might be marijuana growing on Mr.
Thornton's land, and instead of getting

a search warrant and decide to search the property himself, he searched the property himself, and then he requested a search warrant, and in fact, in his affidavit he stated that he searched the property to get the search warrant, and then he went back out and seized the marijuana. There is also the issue of the informant here.

THE COURT: At this stage of the proceedings, I'm really not interested in this witness's expertise in evaluating and observing marijuana. You may proceed with what actually physically took place.

MR. ALSOP: Certainly, Your Honor.

Q Mr. Krandall, prior to going to a certain place in Hartland on that day, did you receive any information which led you to that place?

A Yes, I did.

Q And what sort of information did you receive?

* * *

A I was contacted by a Harold Hartford, he is the Constable in Hartland. He had just talked with the subject, and the subject said he had been in the wooded area and had seen some marijuana, and wanted to get in touch with him. Officer Hartford and myself talked to the gentleman who indicated that he didn't want to be involved.

THE COURT: That he did or he did not?

A He did not. He said that he had just been off the Davis Corner Road and had seen some marijuana growing, or what he thought to be marijuana, and the Constable and I went out in back of a mobile home, beside the road.

Q Well, before telling us where you went, why don't you go to the board and draw a diagram of the area, telling where you went and the particular area of Hartland.

A (The witness leaves the witness stand and goes to the blackboard.) This would be the Davis Corner Road, north would be in this direction here. Mr. Thornton's driveway goes right in there, and his house is right in here.

[7]

A (cont'd) There is a mobile home located right in this area, and another house right in this area. It was indicated to us by the informant that the marijuana was growing somewhere in back of the mobile home, and we went onto the property, between the mobile home and the house, and right in here

there is a wood road, like that, we walked in from the road and up this woods road, and right in this area there was a chicken wire fence, probably three or four feet high, and probably twelve or fourteen foot square, and there was marijuana growing inside that fence.

Q Now let me ask you some questions about that diagram. You indicated that north was on top of the board?

A Yes.

Q And this horizontal stripe here is the road?

A Yes.

Q And that's what, the Davis Road?

A The Davis Corner Road.

Q Why don't you write in the Davis Corner Road right there. Is that

area of the Davis Corner Road in Hartland, is that a rural area or a fairly built-up area?

A It is a rural area.

Q And you have indicated two rectangles lying north of the Davis Corner Road, which I believe you said are residences?

[8]

A This is a mobile home here, and this is a two-story house.

Q Put M and H there for mobile home. And do you know who lives there? Do you know the occupant of the dwelling?

A A fellow by the name of Linwood Leavitt.

Q Why don't you put an L there. And who lives in the mobile home?

A Well, it is an elderly gentleman and his wife. I believe they are

the parents of either Mr. or Mrs. Leavitt, but I'm not sure.

Q And you have indicated a vertical stripe of sorts on the Davis Corner Road. Is this the driveway?

A Yes. This is the Thornton driveway, yes.

Q And what sort of a driveway is that?

A It's a dirt road.

Q Is that a wide road or a narrow road?

A About wide enough for one vehicle.

Q Have you ever been to Mr. Thornton's residence?

A Not prior to this, no.

Q And do you know how far up that road it is, the distance?

A You can see his house from the main road. I'm going to guess that it's probably a distance of

two hundred or two hundred and fifty feet, approximately.

Q And can you estimate the distance between the house here occupied by Mr. Leavitt and the intersection of his

[9]

Q (cont'd) driveway to what you have pointed out as the Davis Corner Road?

A From here to here?

Q Yes.

A Probably not more than five hundred feet at the most.

Q Now can you show on your diagram where you walked when you arrived at that area on August 3rd?

A We went in here between the mobile home and Mr. Leavitt's house, right in here.

Q And where did you go? Can you draw a line showing where you went?

A Right in here, like I said, is a tote road, or woods road of some sort in here, and we got on that woods road and followed the road right up.

Q Is that a wooded area?

A Yes, it is all wooded beyond this point here.

Q Are there any clearings in that area that you can point to?

A Just where the marijuana was growing.

Q Why don't you draw so that we can see where the marijuana was growing.

A Well, there were two fenced-in areas here.

Q And how large a fenced-in areas were they?

A This one was probably fourteen or fifteen foot square.

Q And that is the southern most patch?

[10]

A Yes. And if I remember right, it was small, probably two feet or so.

Q And was there a clearing?

A Yes, there was.

Q How big a clearing?

A Well, there were no trees growing in this area.

Q Can you estimate how large a clearing it was?

A Well, not really much bigger than the patches themselves. There were some trees outside.

Q And between the patches and the Thornton house, were there trees in that area?

A Yes, it is all wooded area in there.

Q And standing where you first observed the marijuana patches, could you also observe the Thornton residence?

A You could see it from the road out in here.

Q Well, when you are saying road, you are referring to the tote road; are you not?

A Yes, the tote road. And if I remember right, there were some cedar trees somewhere down in here, and you couldn't actually see the Thornton residence from that area.

Q Were you able to estimate from any point the distance from the marijuana patch to the Thornton residence?

A Well, after we pulled the marijuana, we walked back to Mr. Thornton's residence, and they were at the house,

[11]

A (cont'd) and this tote road goes right back to the residence, or just to the south of his residence, probably it's five hundred feet or so to the residence, four or five hundred feet.

Q Now when you walked from the Davis Corner Road, where did you park your car; do you remember, when you went up there on August 3rd?

A We parked the car in front of the mobile home.

Q And when you walked from your car up to the marijuana patch, did you go across any fences?

A No.

Q Did you see any fences?

A Just the one around the marijuana patch.

Q Could you see any signs of any sort?

A No.

Q Did you see any streams, or any natural boundaries of any sort?

A No.

Q And are you aware of the property line that may exist between the road and the marijuana patches?

A Yes, I am now.

Q At the time?

A I didn't know who owned the property the first time I was in there, no.

Q Did you have the name of the suspect in mind when you

[12]

A (cont'd) went there on August 3?

A Yes, I just figured in my own mind that it was on Mr. Thornton's property.

Q Trooper Krandall, when you were at the scene there with the two marijuana patches, did you observe any physical evidence that the area was enclosed, or were intruders to be discouraged from coming in?

A No.

Q Was there any sign of cultivation or any sort of man gardening or this sort of thing in the area?

A Well, it was obvious that in the two patches a man had been gardening.

Q Well, around the patches themselves, was that in a wild state?

A No, it was actually a wooded area around there.

Q Were there any paths or other roadways in the area?

A Just the tote road.

Q And were you able to observe the condition of that particular tote road at that time?

A Yes.

Q Well, was it a well-worn tote road, or was it not a well-worn tote road?

A Well, it hadn't been used by a vehicle for quite some time. There was nothing to indicate that it had been used for anything other than a footpath.

[13]

Q Was there any farm machinery, or anything of that sort in the area?

A No, I didn't see any.

Q What did you do after you observed the marijuana?

A Well, I looked at it and determined that it was marijuana, and then I went to the Town Office in Hartland to check the maps to find out for

sure whose property it was on, and I determined that it was the Thornton property, and I came to the District Attorney's Office and obtained a search warrant.

MR. ALSOP: I have nothing further.

CROSS EXAMINATION OF CARROLL KRANDALL

BY MS. ZEEGERS:

Q Officer Krandall, you stated that you had never been to the Thornton residence, or the Thornton property before August 3rd?

A Not that I recall.

Q Now, Officer, you filled out an affidavit in relation to this case, did you not?

A Yes, I did.

Q And that was sworn to before a Complaint Justice?

A Yes.

Q And would you like to get back to your seat here, please? Now in that affidavit you stated, in the last paragraph of that affidavit, that your affiant did

[14]

Q (cont'd) observe approximately one year ago evidence that marijuana was grown on other locations of the property of Richard Thornton, and said that observations did consist of approximately one year ago, and your affiant observed approximately a quarter acre of land, and showed evidence that marijuana plants had been previously cultivated and harvested during the fall of 1980?

A Yes.

Q Okay. In this case, Officer Krandall, the Defendant, Mr. Thornton, has been charged with

furnishing marijuana; is that correct?

A Yes, it is.

Q And as an element of that offense, his having possessed marijuana alleged to be in excess is an element of that crime; is it not?

A Yes, the fact that he was in possession of more than an ounce and a half, he was charged with that.

Q Now Officer, you had no information that Mr. Thornton was in fact selling or giving away marijuana, did you?

A No, I didn't.

Q I would like to direct your attention back to August 3, 1981, and I would like to show you this affidavit, or a copy of the affidavit, the second page of it. Is that the affidavit that you signed in this matter?

A Yes it is.

MS. ZEEGERS: Your Honor, I believe that the Court has the original affidavit, and I think something should be presented into evidence here, but I don't have the original of it.

THE COURT: Do you have a copy?

MS. ZEEGERS: Yes, I do.

THE COURT: Is there any objection?

MR. ALSOP: No objection, Your Honor.

THE COURT: That may be marked as Defendant's Exhibit No. 1, and it may be admitted without objection.

Q Okay, now in that affidavit, Officer, you stated that you had previously seen marijuana grown on that property, but you just stated now under oath that you had never been on the property. Isn't it a fact, Officer, that

you never did see marijuana growing on this property prior to this date, but in fact, the information that you got was from Warden Gilbert about it?

A Yes, it was 1980 that it was meant there. Warden Gilbert contacted me and told me that he found a patch in the wooded area that looked like marijuana was growing, and he took me to that area, and we went up on the upper side of the land there, and when Mr. Alsop asked me if I had been on the property before, I understood him to mean to the house, and I had never been to

[16]

A (cont'd) the house. Again, I had been to the upper part above the property with Warden Gilbert prior to that.

Q What time of the day was it, Officer, that you went to the property on August 3rd, the first time you went there?

A I would be guessing, it would be between 10:00 and 11:00 in the morning.

Q And at that time you didn't have a search warrant?

A No, I didn't.

Q And you made a search of that property?

A I walked in on the property where the informant thought where marijuana was growing.

Q I would like to draw your attention to February 4th, 1982, and ask you whether or not you had a telephone conversation with me on that day?

THE COURT: What was the date?

MS. ZEEGEPS: February 4th, 1982.

A I do recall a telephone conversation but I don't recall the date.

Q Isn't it true, Officer, that during our telephone conversation that you told me you got onto the Thornton property by simply going up the driveway?

A No, I didn't say that.

Q I would like to go to this chart here and ask you,

[17]

Q (cont') Officer, now to begin with, you stated that this was all wooded area?

A For the most part it is, yes.

Q Except for this part here and this part here?

A That is correct.

- Q And this is Richard Thornton's house here?
- A Yes, there is a clearing down by his house.
- Q Can you see down from the driveway here these patches?
- A No.
- Q They are about five hundred feet away?
- A Yes, ma'am.
- Q As you stated earlier?
- A Yes.
- Q And this is all wooded area here?
- A Yes, it is.
- Q And you could not see these patches from this area, or this area?

THE COURT: Just for the record, counsel is pointing to an area northerly of the trailer and the house, and southerly of the enclosed cultivated area.

MS. ZEEGERS: Thank you, Your Honor.

Q So the fences that you were talking about in your affidavit were fenced-in areas on the property of Richard Thornton?

A Yes, it is directly around where the marijuana was

[18]

A (cont'd) growing, yes.

THE COURT: These fences are four-foot meshed fences?

A Yes. It was like chicken wire. It was probably three to four feet high.

Q Officer, I would like to show you a photograph and ask you if you are familiar with that land?

A That is a fence, and the material of the fence is similar to what

was around the marijuana, but this was taken in the wintertime. I'm not sure that that is the same area, but it is a similar type fence.

Q So it could be that area then.

MS. ZEEGERS: Your Honor, I would like to mark this as Defendant's Exhibit No. 2.

Q I would like to show you another photograph and ask you if you are familiar with that?

A Well, again, it looks like the area, but when I was there in August there were leaves on the trees, and it certainly looks different. The only thing I can say is the fence is made out of the same material.

MS. ZEEGERS: I would like to offer this exhibit in evidence as Exhibit No. 3.

MR. ALSOP: No objection.

THE COURT: How many pictures do you have there?

MS. ZEEGERS: I have about seven.

[19]

THE COURT: Why don't you show them all to Mr. Alsop first and maybe we can admit them without objection, without going through each one. I take it that these are all pictures of the surrounding area?

MS. ZEEGERS: That's right, Your Honor. The prosecutor would like the officer to identify these photographs.

Q Does this look like the wooded area on the residence of Richard Thornton?

A It could be, but there is nothing I can identify from that photograph.

MR. ALSOP: May I ask the number of that exhibit?

MS. ZEEGERS: That was 4.

THE COURT: When did the search take place?

MS. ZEEGERS: August 3, 1981.

A It is possible that this is Mr. Thornton's property, but there is nothing I can identify.

MS. ZEEGERS: It could be.

THE COURT: Just a moment. We are going to have a question and an answer, and an objection or an inquiry if there is one. Right now we are getting a garbled mixture of comments.

Q Officer, does this look like it could be on the property of Richard Thornton?

THE COURT: And by this area you are referring to

[20]

THE COURT (cont'd): Defendant's Exhibit No. 7?

MS. ZEEGERS: Yes, Defendant's Exhibit No. 7.

A That could be.

Q I would like to show you what has been marked as Defendant's Exhibit No. 5, and ask you if this could be on the Defendant's property, and whether or not that looks like the footpath that you are referring to that gets you to the fenced-in area?

A I don't recognize it but it is possible.

THE COURT: Mr. Krandall, would you please try to keep your voice up?

MR. KRANDALL: Yes, sir.

Q Officer, I would like to show you what has been marked as Defendant's Exhibit No. 6, and ask you if this looks like the area on the property of Richard Thorneon, and whether

or not that could be the footpath
that you have been referring to?

A It could be.

Q Officer, I would like to show you
what has been marked as Defendant's
Exhibit 9, and ask you if that
looks like the driveway of Mr.
Thornton?

A Yes, it does.

Q I would like to show you what has
been marked as Exhibit No. 10,
and ask you whether or not that
is another photograph of the
driveway of Richard Thornton?

[21]

A It could very well be. The only
thing I recognize is the van
parked in the dooryard.

Q I would like to show you what has been marked as Defendant's Exhibit No. 11, and ask you if that is another photograph of the driveway?

A Yes.

MS. ZEEGERS: Your Honor, I have requested that Defense Exhibit No. 12 be offered into evidence, and I don't believe that this officer would have any reason to have seen this photograph. This is an aerial photograph taken from the Town records.

MR. ALSOP: No objection, Your Honor.

THE COURT: What number is that?

MS. ZEEGERS: No. 12.

THE COURT: Exhibit No. 12 may be admitted without objection.

Q I have just one more, Officer, Defendant's Exhibit No. 13, and I would like to ask you if you have ever seen that 'No Trespass' sign on the Defendant's property?

A No, I don't recall that I have.

THE COURT: Are these being offered?

MS. ZEEGERS: Yes.

THE COURT: Is there any objection?

MR. ALSOP: Your Honor, I object to Nos. 4, 7, 5, and 6. I do not object to 9, 10, 11, and 12, and the ones

[22]

MR. ALSOP (cont'd): that I object to, I just don't feel there has been any identification on them as far as what the photograph depicts. There are undifferentiated areas of grown-over fields and woodlands covered with snow, and I don't think the Officer simply, as he said, isn't able to identify them at all.

THE COURT: May I see the ones on which objections are raised? Let me ask you, do you plan to put on other witnesses?

MS. ZEEGERS: Yes, I do, Your Honor.

THE COURT: And you can establish these through other witnesses?

MS. ZEEGERS: Yes, that's right, Your Honor.

THE COURT: Those exhibits to which there is no objection may be admitted without objection, and those exhibits to which there is an objection, the objection will be sustained. Just for the record, may we have those to which there is no objection again?

MR. ALSOP: Just for the record, Your Honor, Exhibits 9, 10, 11 and 12, there is no objection, Your Honor.

THE COURT: All right, you may proceed.

MS. ZEEGERS: There is No. 8, as well.

MR. ALSOP: I would object to No. 8 on the same basis as the others, Your Honor.

THE COURT: All right, 9, 10, 11 and 12 will be

[23]

THE COURT (con't): admitted without objection. And the others are 1 through 8, and 13?

MR. ALSOP: Yes, Your Honor.

THE COURT: The objection will be sustained.

MS. ZEEGERS: Your Honor, some of those exhibits are not photographs, one is the affidavit.

THE COURT: No. 1 is the affidavit, and that has already been admitted. All right.

Q Okay. Officer, I would like you to direct your attention again to the chart that you drew, and you

stated to the Court that you got onto the property through the back of this mobile home here?

A Yes.

Q And you got onto the footpath and went to the fenced-in area?

A Yes.

Q And you stated also that this was all wooded right here?

A Yes, it is, it is a wooded area behind both of those.

Q And when you went out to the property the first time, you obviously had no consent from the owner to go onto that property, that is from Mr. Thornton?

A That is correct.

Q And you were not going onto the property incident to an arrest?

A No.

Q Now going back to the affidavit which has been marked as Defendant's Exhibit No. 1 in this case, you stated that on information and belief supplied by a reliable cooperating citizen, that on or about the 31st day of July, 1981 in Hartland, County of Somerset, that said citizen did observe marijuana plants growing in several areas tended by a wire mesh fence in a wooded area behind the residence of Richard Thornton, Davis Corner Road, is that not what you said in that affidavit?

A Yes, ma'am.

Q And you did not say anything in that affidavit that reliable cooperating citizen was in fact an expert on identifying marijuana, did you?

A No, I didn't.

Q You did not also say in that affidavit that that citizen was there -- that there was no underlying facts of reliability in that affidavit, did you not?

A No, I didn't.

THE COURT: May I have that question again?

Q You did not say in your affidavit, you did not state in your affidavit, any underlying facts why you believed that that informant was reliable?

A No, I did not.

Q And you did not state any underlying facts in that affidavit why you believed that that informant was a

[25]

Q (cont'd) Credible person?

A No, I did not.

Q And, in fact, in that affidavit, Officer, you did not even say that marijuana plants were growing on Richard Thornton's property, did you, you stated that the informant told you that there was marijuana growing behind the wooded area behind the residence of Richard Thornton?

A That's right, the informant didn't tell me what property it was, he didn't know.

THE COURT: He didn't know?

A Apparently no, he just told me where it was.

Q And when you made a search of that property, not only you went on that property to do the search, but Constable Albert also went on the property that morning?

- A He was with me that day, yes.
- Q And how long did you search that property?
- A We were probably just on Mr. Thornton's property a total of ten minutes. We just walked in and observed where the marijuana patch was, and then back off.
- Q How many acres of land does Mr. Thornton own?
- A I'm not sure.
- Q His land, for the most part, is wooded land, is it not?
- A Yes, I believe it is.
- Q Officer, I would like to show you Defendant's Exhibit

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- Q (cont'd) No. 12, which the Town of Hartland has put out, and this is an aerial photograph of Mr. Thornton's property, and I would

like to ask you if you can spot on that photograph the area of Mr. Thornton's residence?

A I can spot what I believe is Mr. Thornton's residence, but I don't recognize it from the aerial photograph.

THE COURT: I can't hear what you are saying.

A I said I believe that to be Mr. Thornton's residence right here.

THE COURT: Well, you're going to have another witness anyway. He has knowledge of that.

MS. ZEEGERS: That's right.

Q I will ask you, Officer, is this an aerial photograph which appears to be essentially a wooded area?

A Yes, it does.

Q And can you tell me what this section is here, this number on the photograph?

A 925.

Q Is that 925 feet?

A Yes.

Q So in other words, one of the boundaries is 925 feet long?

THE COURT: Well, that exhibit is in evidence; isn't that right?

MS. ZEEGERS: Yes.

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THE COURT: Is there anything specific that you want this witness to testify to regarding that exhibit?

MS. ZEEGERS: Well, basically, Your Honor, only that this whole property is wooded.

A Yes.

Q Now you have testified there was a footpath going on the Defendant's property out to this fenced-in area. Can you tell me where the footpath started?

A When I went in behind the mobile home into the wooded area, I came onto the footpath, and I came back out through the woods to the road.

THE COURT: When you're talking about the footpath, is that the same path that you originally referred to as the tote road?

A Yes.

Q And you didn't know where this went then?

A I do now, but I didn't at that time.

Q Where did you then go?

A After we searched the property and seized the marijuana, we continued on to the so-called tote road, and back as it comes right back to Mr. Thornton's driveway down by his house.

Q Now, Officer, you stated in your affidavit that you received information on July 31st, 1981 that marijuana was supposedly growing on that property, did you not?

[28]

A I don't recall, probably I did, yes.

Q And you, in fact, waited three days before you got a search warrant, did you not?

A Yes.

Q After that time. Did you try to get a search warrant on July 31st?

A No. As I recall --

Q Thank you, Officer, I think you have answered that question. Did you try to get a search warrant on July 1?

A No.

Q Did you try to get a search warrant on July 2?

A No, I didn't.

Q So therefore, before you got the search warrant, you were not concerned that this marijuana was going to be destroyed, were you?

A I believe I was concerned, but I was tied up with another matter.

Q Well, you were not concerned enough to go get a search warrant that day, in fact you waited three days to get one?

A I didn't have an opportunity to do it prior to that.

Q When you went on the property and you saw marijuana growing, why didn't you go and get a search warrant?

A Well, I figured the marijuana was still there, and there

A (cont'd) didn't appear to be anybody right near it at the time, and I figured that if I was going to seize it right, I should probably get a warrant. So I contacted the DA's Office.

Q Why was it better to get a warrant?

A Well, if you have time to get one, it is always better, as I understand it.

THE COURT: Well, I suppose the next question should be, Officer, why didn't you get a warrant the first time instead of when you went there the second time? I mean, why didn't you get a warrant when you had this information?

A I didn't know exactly where the marijuana was. I didn't know

whose property it was on, and I didn't feel without checking it that I had enough information.

Q Officer, I would like to show you the search warrant in this case, and let you read that for a second. I would like to get a copy of that if you have one in the file.

THE COURT: Before we leave the physical property, Officer, can I interrupt you for a minute?

A Yes.

THE COURT: You say you went back to the Thornton house; is that right? Or down the footpath?

A After we came back with a search warrant to take the marijuana.

[30]

THE COURT: When you went back to the footpath, were you able to

observe how far the footpath was from the road, the access road and the driveway to the Thornton house?

A We came back down the footpath and came back onto Mr. Thornton's driveway. It was probably forty or fifty feet south of the house and the driveway.

THE COURT: Now, are there any other homes on that driveway?

A No.

THE COURT: So the road that goes from the Davis Corner Road northerly is the driveway solely and exclusively for Mr. Thornton?

A Yes, it is.

THE COURT: And does it stop there at the Thornton residence?

A Yes, it does.

THE COURT: Where is the front door of the Thornton house as it relates to the driveway?

A It would be on the side of the house.

THE COURT: Which side, north or south?

A It would be on the east side of the house, facing the driveway.

THE COURT: On the east side of the house?

A Yes.

THE COURT: Is there any other doorway to that

[31]

THE COURT (cont'd): house?

A I am not familiar with whether there is or not.

THE COURT: Is there a garage or driveway immediately adjacent to the Thornton house?

A I don't believe there is a garage, there might be a few small out-buildings.

THE COURT: How far are these two patches enclosed by the wall or wire mesh fence approximately from the driveway?

A Probably five or six hundred feet.

THE COURT: I take it there is no question that you cannot see these areas from the driveway or from the house; is that right?

A No, I wouldn't think so.

THE COURT: And would the road, or the footpath, so-called, also be approximately five or six hundred feet, or a little longer?

A Probably a little longer.

THE COURT: And the area from the Davis Corner Road to the footpath as you traversed it would be approximately how far, to the footpath?

A Are you referring to the area in back of the mobile home?

THE COURT: I am referring to the area from the Davis Corner Road northerly to the footpath?

[32]

A Probably three hundred feet, two to three hundred feet.

THE COURT: And do I understand that it is a wooded area immediately northerly of the house and trailer, and is immediately southerly of the footpath?

A The marijuana was growing on the north side of what you are referring to as the footpath.

THE COURT: Well, I am talking about the area between the house -- not the Thornton house -- but the house marked HL and the mobile home marked M, the area between that and the footpath. Is that a heavily wooded area?

A The wooded area starts right behind the residence. It is all wooded from there back.

THE COURT: Until you get to the footpath?

A That's right, it is growing up.

THE COURT: So there is a heavily wooded area on each side of the footpath; is that right?

A Yes, there is.

THE COURT: I take it that there is no access, or no ready access to the two wire and mesh enclosures from the the west?

A No, it is all wooded area, west of that.

THE COURT: You may proceed.

Q (Ms. Zeegers) Now you have looked at that search warrant, have you not, Officer?

A Yes, I have.

Q And the place that appears to be searched on there, it says the wooded area behind the residence of Richard Thornton, does it not?

A Yes, it does.

Q And in fact it doesn't even say you were to search the property of Richard Thornton, does it?

A There was no reason to check the residence.

THE COURT: I'm sorry, I didn't hear you.

A I had no reason to check the residence.

Q Officer, bringing your attention back to the affidavit in this case, you were asked that you be commanded to search all land occupied by the said Richard Thornton, excluding buildings

and structures designed to exclude human beings; did you not?

A Yes, I did.

Q Can you tell me what you mean by that?

A I don't think I understand the question.

Q Was that your statement on the affidavit? I don't understand the question either.

A What I was asking for was to search the property and not to search the buildings. I believe that 'excluding' is a typographical error.

Q Do you know where the boundary lines of Mr. Richard Thornton's property are?

A I know basically where they are.

[34]

Q When you came back after you got

the search warrant and searched the property, how long were you there?

A Probably forty-five minutes to an hour.

Q How did you know when to stop searching Richard Thornton's property and not search somebody else's property?

A I guess I don't.

Q When you went to the DA's Office to get a search warrant, you did not bring a deed of Richard Thornton's property with you, did you?

A No, I didn't.

Q You stated in your affidavit that you previously saw, and you thought it was back in 1980, that you saw evidence that marijuana had been harvested and cultivated on that

property, and you stated earlier that the only clear land on this entire property were these two fenced-in areas, and you stated that those fenced-in areas were around fourteen foot square or maybe thirteen foot square each, but in your affidavit you stated that you saw in 1980 a quarter acre of land that had some evidence that marijuana had been harvested. Isn't it true, Officer, that there isn't a quarter acre of cleared land on this entire property?

A There were three or four garden spots on the property, but I don't know if it would be a quarter acre.

[35]

Q You don't know if there is a quarter acre?

A No, I don't.

Q And you didn't know at that time that there had been a quarter acre of land where marijuana had been previously harvested?

A It is from what I recall from going in there with Warden Gilbert in the wooded area east of the property.

Q But you did not see then a quarter acre?

A Well, from my recollection, an area had been cultivated, and I thought it would be approximately a quarter acre.

Q But you weren't sure?

A No.

Q Officer, I would like to show you Defendant's Exhibit No. 13, and ask you if you recognize that, or can you tell me what that is?

THE COURT: Well, we already know, or he has already testified that he didn't see it. Are there any further questions about it?

Q Officer, have you ever seen those No Trespassing signs on Mr. Thornton's property?

A No.

Q You haven't seen three No Trespassing signs from the road?

A Not that I noticed.

MS. ZEEGERS: Your Honor, I have no further

[36]

MS. ZEEGERS (cont'd): questions.

REDIRECT EXAMINATION OF TROOPER KRANDALL

BY MR. ALSOP:

Q The cooperating citizen that you have referred to in your affidavit, did you feel comfortable in relying

on what he had to say to you before going out there?

A Yes, I did.

Q And everything that he said to you was confirmed by your own observations when you arrived at the scene?

A Yes, it was.

Q Would you have felt comfortable in getting a warrant from the information that you received from a reliable cooperating citizen, acting on that information alone?

A Yes, I would have.

Q You went to the scene yourself?

A Yes.

MR. ALSOP: I have nothing further.

MS. ZEEGERS: I have no further questions.

THE COURT: Thank you, Officer.

LINDA THORNTON, called on behalf of the Defendant, having been duly

sworn, testified as follows:

CLERK OF COURTS: Do you solemnly swear that the testimony you shall give in the cause now in hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

[37]

MRS. THORNTON: I do.

DIRECT EXAMINATION OF LINDA THORNTON

BY MS. ZEEGERS:

Q Would you state your full name for the record?

A Linda Sweet Thornton.

Q What is your address, Mrs. Thornton?

A Davis Corner Road, Hartland, Maine.

Q And are you related to Mr. Thornton?

A Yes.

Q Mr. Richard Thornton?

A Yes, he's my husband.

Q And how long have you been married?

A About three years.

Q And have you lived at your residence on the Davis Corner Road for that period of time?

A Yes.

Q And who else lives there with you at that residence?

A We have a baby.

Q Who owns the property that you live on, that you and your husband live on?

A Richard owns it.

Q And how long has he owned this property?

A Eleven years.

Q And how long have you lived on that property?

A Nine.

[38]

Q Are you familiar with all of the property that is owned by your husband?

A Oh, yes.

Q And how are you familiar with the property?

A I have walked over it several times, all of the boundaries, and I have been through it a lot.

Q And how long have you been familiar with the property?

A Since I moved there. I have lived there seven years.

Q And, Mrs. Thornton, I would like to show you what has been marked Exhibit No. 12, and ask you if that is a fair representation of the property that is owned by your husband?

A Yes.

Q Can you tell me how many acres of land your husband owns?

A Approximately thirty eight.

Q And those acres are fairly square?

A Yes, and all wooded, or mostly.

Q Now, Mrs. Thornton, looking back to this photograph marked as Defendant's Exhibit No. 12, can you see in that photograph an area where there are various footpaths on that property?

A Yes.

Q And can you tell me when this photograph was taken pursuant to the affidavit of the Town Clerk?

[39]

A 1975.

Q And can you tell me if those footpaths have grown up since 1975?

A Yes, considerably.

Q Now, Mrs. Thornton, I would like to show you Defendant's Exhibit No. 5 and ask you if this is a fair representation of the footpaths on your property?

A Yes.

Q Are these two footpaths very near to the two fenced-in areas on your property?

A Yes.

Q How would you describe the property owned by your husband?

A Well, the boundaries are in the woods on one, two, three, four sides, actually five. There is a portion of that on the road.

Q And you say that your property is primarily wooded?

A Yes.

Q Can you tell me what areas of the property are not wooded?

A There is a garden, a vegetable garden area, approximately thirty by sixty that is fenced in and there is a clearing where the new house would be, two spots, six by six, and six by nineteen, two other spots.

Q So there are only three areas on the property that are cleared?

[40]

A Yes.

Q And they are fenced-in areas?

A Yes.

Q And you have brought a chart here with you today, have you not?

A Yes.

Q Mrs. Thornton, can you come over here and just mark on this chart for us, and this is the aerial photograph that was taken in 1975,

and can you tell me the different areas on this photograph on the land as it appears today?

A Well, this photograph, there is only one building shown, down here this house wouldn't be there at the time.

Q Would you mark what these are?

A This is the new site of the house. This is the screen house that we have for picnics. And there is our home right here, and the sauna outhouse, and the woodshed.

Q Mrs. Thornton, would you mark right on that map approximately where the two other fenced-in areas are, and where the smaller fenced-in area is? You can sit down now. Mrs. Thornton, would you tell me about the area surrounding your borders, is that area all wooded?

A Yes, right there it is all wooded. The only non-wooded area would be on the Davis Corner Road, a small area

[41]

A (cont'd) right there, and all the rest is all wooded.

Q Can you tell me how one could make out the boundaries of your property?

A There is an old stone wall, and a barbed wire fence, an old barbed wire fence, and they go all the way around the property.

Q And would you describe the area that you and your family live on a rural area?

A Yes.

Q I would like to show you what has been marked as Defendant's Exhibit No. 13, and ask you if you are familiar with that?

A Yes.

Q What is it, Mrs. Thornton?

A It is a No Hunting, No Trespassing sign.

Q Would you stand up and mark out on the chart where these, or where any No Hunting or No Trespassing signs appear on your property?

THE COURT: Do you mean now or in the summer of '81?

Q In the summer of '81, July or August, 1981.

A There are three on this road right here, one right there, and on these borders, there are two, spaced pretty well, No Hunting and No Trespassing. And here.

THE COURT: How about on the footpath, so-called, or the tote road?

[42]

A No. Where these old tote roads

are, it comes through at different places, through here on the border where one might come over across, there is a sign.

Q So in other words, where one comes onto your property?

A Yes, they would see it.

THE COURT: Now the tote road, or one of the tote roads which goes from the driveway around to the area in back of your house where the wire mesh enclosures are; is that right?

A Right. There is just a little clearing down in here where the trailer is, and then there is a little field right in here.

THE COURT: Well, I'm talking about the place where the marijuana allegedly was growing, is there a footpath that goes past the area?

A Yes, it goes past that area.

THE COURT: And that footpath also goes to the driveway, is that right, near your house?

A Yes. There is a little field right here.

THE COURT: Well, what I would like to know is, are there any No Trespassing signs on that tote road or that footpath?

A No, not right there.

THE COURT: Or anywhere along that road?

A Well, along, right on this road right here, the main

[43]

A (cont'd) road, yes there are.

THE COURT: And that's the Davis Corner Road?

A Yes, there are three signs right through here, No Hunting and No Trespassing. On this driveway that goes in just a little way, there's a small field in here, and there's a grown-up stone wall that starts here, and just off to the side is an old stone wall right here.

Q And do some of these No Trespassing signs fall down in the wintertime?

A Oh, yes.

Q And do you always put them back up again?

A Yes.

Q Are they on your property today?

A Yes.

Q Now, Mrs. Thornton, I would like to show you Defendant's Exhibit No. 2 and ask you if you are familiar with this?

A Yes, I am.

Q And can you describe this to me?

A It is approximately a six by nineteen fenced-in area in the woods.

Q And can you tell me where that fenced-in area is on the chart?

A Right there. There are two small ones, yes, six by six.

[44]

Q And while you're right here, I would like to show you Defendant's Exhibit No. 4, and ask you if you are familiar with that?

A Yes.

Q And can you tell me what that fenced-in area is?

A That's the same spot, right here.

Q And is that a different fenced-in area?

A Yes.

MS. ZEEGERS: You may step down.

(The witness returns to the witness stand.)

Q Can you tell me in this area surrounding the fenced-in area, is that wooded?

A Yes.

Q Can you see the fenced-in area from the road?

A No.

Q From the Davis Corner Road?

A No.

Q Can you see them from your driveway?

A No.

Q Can you see them from the borders of your neighbors' property?

A No.

Q I show you what has been marked as Defendant's Exhibit No. 7,

and ask you if that is also a picture of one of the fenced-in areas?

[45]

A Yes.

Q And when was that picture taken?

A That would be in the winter, January.

Q And approximately how far are the other -- other than the two fenced-in areas we are talking about -- about how far from the border of your property --

THE COURT: Which border?

MS. ZEEGERS: This border here.

THE COURT: Southerly border?

MS. ZEEGERS: Yes, southerly border.

A Approximately two hundred and fifty feet.

Q And approximately how far are those fenced-in areas from the driveway?

A Oh, one hundred and fifty or two hundred feet.

THE COURT: How far? One hundred and fifty?

A Approximately.

THE COURT: From which part of the driveway?

A Well, where she pointed was toward the end of the driveway.

THE COURT: Toward the intersection of the Davis Corner Road end of the driveway?

A Yes.

THE COURT: And how far do you say it was?

A From where the mesh chicken wire is to the back of the property behind the houses was measured at two hundred,

A (cont'd) or approximately two hundred and fifty feet.

Q So it was a little further than two hundred and fifty feet to the driveway then. I would like to show you what has been marked as Defendant's Exhibits Nos. 10, 9, and 11, and ask you if you recognize them?

A Yes.

Q And would you tell us what each of them are?

A The first one is No. 11, is from the Davis Corner Road looking down our driveway, and standing in the road.

THE COURT: When you say looking down, do you mean looking in a northerly direction?

A Yes. A northerly direction to the house. And No. 10, it is a

little farther down the driveway, looking north. And the third one, No. 9, is the house itself.

THE COURT: And that's looking from the driveway in a northerly direction toward the house?

A Yes.

Q How far from your driveway is the No Trespassing sign?

A To the first one? I would say maybe thirty feet or twenty feet, I'm not exactly sure. It is close to the driveway.

Q And you say twenty or thirty feet from the driveway?

A Yes, to the right of the driveway.

Q Mrs. Thornton, what is the approximate total amount of cleared land that you have in the driveway on your

Q (cont'd) property, excluding the buildings and foundation?

A The only other areas are the garden and the two fenced-in areas.

Q And do you know approximately how big that would be?

A The garden is twenty-eight, sixty-two, approximately, and the other small ones are six by six and nineteen by six and a half.

Q Are there any footpaths that go from those two fenced-in areas to your house?

A Well, yes, indirectly.

Q Have you or your husband ever allowed anyone to routinely walk through your property to get to anyone else's property, or to the road?

A No.

Q And you have not allowed hunters on your property?

A No.

Q And you have not allowed other trespassers on your property?

MR. ALSOP: Your Honor, I object.

That is leading.

THE COURT: Sustained.

Q Now these footpaths that you have referred to coming from this area on the north side of your property, from the boundary of your property getting to these two fenced-in areas, would you be able to get through there?

[48]

A No.

Q And how would you described the footpaths to that area?

A Very overgrown, and a lot of them have been washed out.

Q Now, Mrs. Thornton, I would like to show you what has been marked as Defendant's Exhibit No. 3, and ask you if you are familiar with that area?

A Yes.

Q And can you tell me what that area is?

A That is one of the fenced-in areas in question here.

Q Can you tell me about how far away the person was that was taking that photograph from the fenced-in area?

A Right beside it. The fence is right there.

Q Did you have any occasion to see any police officers on August 3, 1981?

A Yes.

- Q And when did you see them?
- A I came home around noontime, and I saw a vehicle in the neighbor's yard, and later that day I saw, well, three of them came to my house.
- Q And what time of the day was that?
- A Approximately 4:30.
- Q And what were you doing at that time?
- A I was making supper.
- Q And how did the police officers get onto your land?
- A They had to have drove a car up the driveway.

[49]

- Q And when did you first speak to the police officers?
- A When they came to the door.

Q And what did he say when he opened the door?

A Well, they gave me a search warrant, and they told me that they were looking for marijuana, and that they were going to search.

Q And what did you say to them?

A Go ahead.

THE COURT: I'm sorry, what did you say?

A To go ahead.

Q Well, when the officer first gave you the search warrant, did you ask the officer anything?

A I asked him if my husband had to be there in order to have him search.

Q And what did he say?

A No.

Q And then what did you say?

A I don't know. Go ahead. I couldn't say anything else.

Q So by that time the officer had already told you that he was going to search?

A Oh, yes, they told me that they were going to search, and that he did not have to be there in order to do it.

Q And at the time that you were talking to the police officer, what were the other officers doing?

A They were standing around the front of the house,

[50]

A (cont'd) walking around, and waiting, and looking.

Q And where was your husband at the time?

A At work.

Q And when did he return home from work?

A At approximately 5 o'clock.

Q Had the police officers already searched your property by that time?

A Yes, they were gone. I don't know where they had gone.

Q When the officer came to your door, did you consent to the search?

A No, I did not give them permission to search. They told me they were going to.

Q Mrs. Thornton, I would like to show you this document and ask you if you are familiar with it?

A Yes.

Q And what is it?

A This is what Officer Krandall gave to me when he came to the house.

Q And I would like to mark it as
Defendant's Exhibit No. 14.

THE COURT: What is that the
warrant?

MS. ZEEGERS: Yes.

Q Did the officer give you anything
else?

A No, he gave me this piece of
paper.

Q Nothing was attached to it?

[51]

A No.

THE COURT: Is there any question
that the affidavit was not attached to
the warrant, Mr. Alsop?

MR. ALSOP: I don't think it was,
Your Honor, but I really don't know.

MS. ZEEGERS: I have one further
question.

Q All of the photographs that I have shown you with the exception for the photographs that came from the Town Office, who took those photographs?

A My husband.

Q But you are familiar with all of that land, and you are familiar with those photographs?

A Yes.

MS. ZEEGERS: I have no further questions.

THE COURT: Those pictures, or the evidence contained in those photographs, Mrs. Thornton, are they a reasonable representation of what existed on the face of the earth at the time they were taken?

A Yes.

THE COURT: And you are offering 2 through 7, is it?

MS. ZEEGERS: Yes. And 14, Your Honor.

THE COURT: Well, 9 through 12 have already been offered and admitted; is that right?

MS. ZEEGERS: Yes.

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THE COURT: And now you're offering, 2, 3, 4, 5, 6, 7, 8, 13 and 14; is that right?

MS. ZEEGERS: Yes.

THE COURT: Mr. Alsop?

MR. ALSOP: Nothing further.

THE COURT: Do you have any objection?

MR. ALSOP: No.

THE COURT: Those exhibits may be admitted without objection. Cross examination, Mr. Alsop?

CROSS EXAMINATION OF MRS. THORNTON

BY MR. ALSOP:

Q Mrs. Thornton, on this south bound of your property here, where you say there is a stone wall; is that correct.

A Yes.

Q Is that an old stone wall?

A Yes.

Q Is it fair to say that it is well broken down and fallen into pieces?

A In parts, or in places, but it is all still there, mostly it's all still there.

Q And far apart?

A In some places.

Q Well, how far apart? A foot?

A In some places, yes. It is an old wall.

Q Heaved up, and spread around in various places?

A In spots, yes.

Q And the signs around your property, would you say it is possible to walk around your property without seeing one?

A Well, I suppose.

Q And particularly if you walk through this area you would be able to walk through and not step over this wall?

THE COURT: Well, when you are referring to this area, for the record, Mr. Alsop, what area are you referring to?

MR. ALSOP: The area of the Leavitt trailer, the trailer on the old diagram which has been marked as -- and I can't remember what - the trailer and the area along the road where Mr. Leavitt lives.

A Yes.

Q It is possible to walk through there and step over that stone wall?

A You would know you were going over the wall, I believe.

Q Is it possible not to see this particular sign?

A Yes.

Q That you say is there. Are these two plots where the marijuana was found growing, surrounded by chicken wire?

MS. ZEEGERS: I object, Your Honor.

[54]

THE COURT: The objection is sustained.

Q Have you been out to these plots?

A Yes, I have.

Q And more than once during the course of the summer of 1981?

A Yes.

Q And were you aware of what was growing out there?

A Yes.

Q Is that in fact why they were growing out in that area?

A Yes.

Q Is it fair to say that you or your husband did not want it to be viewed from the road; is that true?

A True.

Q In fact, they were out in a well-wooded area?

A That's true.

Q And the fence around them was to keep out the animals?

A Anything that would bother it, not necessarily animals.

THE COURT: Police and things like that?

Q Was it possible to see through the fence?

A If you looked through the fence, yes.

Q How do you get inside of those fences?

A Pull the wire down.

Q So there was no gate on it or anything of that sort?

A No. You would have to search to find your way in.

Q This so-called tote road, or foot-path, is quite grown

[55]

Q (cont'd) up, isn't it?

A Yes.

Q And it runs from the house to these?

A No, not directly.

Q Well, in that area?

A Yes.

Q Is it possible from standing at your house to see the marijuana growing?

A No.

Q And standing in the marijuana patch is it possible to see your house?

A No.

Q Or the road?

A No.

Q Did you take any pictures of the wall that surrounds your property?

A No.

MR. ALSOP: I have nothing further.

THE COURT: Do you have anything further, Ms. Zeegers?

MS. ZEEGERS: No, I have no further questions.

THE COURT: You may step down.
Thank you.

Oh, excuse me, one question. In your house you have a front door, I take it, that faces the driveway?

A Yes.

[56]

THE COURT: Are there any other entrances?

A To our home? No.

THE COURT: So that is the only entrance?

A Right.

THE COURT: So if someone were going to deliver milk there, or any delivery man, they would come to that door?

A Right.

THE COURT: And that's on the east side of the house facing the driveway?

A Yes.

THE COURT: Okay. Thank you.

MS. ZEEGERS: I would like to call Constable Hartford.

THE COURT: For what purpose?

MS. ZEEGERS: Well, Constable Hartford was on the property, searching the property before the search warrant was issued, Your Honor.

THE COURT: Is there any question about that?

MR. ALSOP: No, I believe he was with Trooper Krandall at the time Mr. Krandall went to the scene the first time.

THE COURT: Is that what you want to establish?

MS. ZEEGERS: Yes.

THE COURT: Is there anything else that you want to establish through his testimony?

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MS. ZEEGERS: Your Honor, I had a

conversation with Mr. Hartford, and he told me that he did, with Trooper Krandall, that they went through the property the first time to search through the driveway, or up the driveway, or to the left of the driveway.

THE COURT: You may call him. I take it that you won't stipulate to that?

MR. ALSOP: I don't believe so, Your Honor.

THE COURT: How many more witnesses do you have after that?

MS. ZEEGERS: I'm not sure. I might have one more.

THE COURT: Do you have any witnesses, Mr. Alsop?

MR. ALSOP: No.

HAROLD HARTFORD, called as a witness by the Defendant, having been duly sworn, testified as follows:

CLERK OF COURTS: Do you solemnly

swear that the testimony you shall give in the cause now in hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

MR. HARTFORD: I do.

DIRECT EXAMINATION OF HAROLD HARTFORD

BY MS. ZEEGERS:

Q Constable Hartford, you went up on the property of Mr. Thornton on August 3, 1981, in the morning of that day, did you not?

[58]

A Yes, ma'am.

Q And you went onto the property before you and Officer Krandall obtained a search warrant?

A Yes, ma'am.

Q And do you remember the conversation that you and I had over the telephone approximately a week and a half ago regarding this case?

A I believe so, yes.

Q And do you remember also from that conversation, Officer, don't you, that you told me when you went onto the property that morning to search the property, that you went onto the property right up the driveway, did you not?

A I'm not sure. I do recall the conversation.

Q When you made a search of this property before you obtained a search warrant, you, in fact, got onto the Defendant's property through his driveway, and then you left his driveway and went up onto a small footpath through the wooded area and the fenced-in area?

A No, ma'am.

Q What did you do?

A From his driveway, approximately three or four hundred feet, there is a house trailer, and we went in across on the property where the house trailer was setting through a woods road or path, and turned left on the

[59]

A (cont'd) woods road to north of the area -- We'll say north.

Q Would you say that that woods road basically is a footpath?

A Yes.

Q So then what you are saying is, as you started up the driveway, you then left his driveway --

A No, ma'am. We went up the road, the Davis Corner Road, and parked the cruiser, I believe, just beyond the house trailer, and we

went in across the property, I believe, the Leavitt property. I believe that's the name.

Q And then you went on the property of Mr. Thornton?

A Yes.

Q Are you familiar with the No Trespassing sign on the Davis Corner Road on the Thornton property?

A No, I am not.

MS. ZEEGERS: I have no further questions.

MR. ALSOP: Nothing further, Your Honor.

THE COURT: You may step down.
Thank you.

Do you rest?

MS. ZEEGERS: Yes, Your Honor.

THE COURT: Does the State rest finally?

MR. ALSOP: Yes.

THE COURT: Mr. Alsop, do you wish to be heard in

[60]

THE COURT (cont'd): argument?

MR. ALSOP: Yes, Your Honor.

CLOSING ARGUMENT by John Alsop, Assistant
District Attorney

I think this is a case where actually Officer Krandall got some information from a citizen that marijuana, being out in that wooded area, and he went out there to see for himself to look at it, and if he had actually seized it at that time it would have been a permissible open field type of search, based on the evidence we have heard today. As it was, he went and got a warrant.

THE COURT: How can you say that? How is this an open field situation?

What evidence is there that this is an open field situation?

MR. ALSOP: Well, it is not open field, it is open woods, Your Honor.

THE COURT: Well, is this anything like the Hester open field situation?

MR. ALSOP: Yes, Your Honor. It is not within the curtilage, it is not in the area that is in any way designed to exclude anybody who has a reasonable expectation of privacy.

THE COURT: Well, isn't the test an extension of that case? Isn't that case still good law in Maine?

MR. ALSOP: Yes, Your Honor.

THE COURT: And you don't think there was a reasonable expectation of privacy on the part of the Defendant here?

[61]

MR. ALSOP: No, Your Honor.

THE COURT: I would be more interested in hearing your argument with respect to whether or not the warrant itself was a valid warrant under Aguilar.

MR. ALSOP: Well, the evidence, first of all, the probable cause cited in the warrant, it was fresh, it was based on his own observation, not the observations of the informant, and it is just a way of explaining -- The officer had a right to be there, that is what I would suggest, Your Honor, that is the crux of the case. He went out to check out the information that he had received in a wooded area where there were No Trespassing signs or anything. He had the right to be there. He came back. He wrote up an affidavit saying, "I was just there. This property belongs to Mr. Thornton, and I would like a warrant."

That is really what it boils down to. It is not really an issue as to whether or not the informant was reliable or not. The issue is whether Carroll Krandall was reliable or not, and as stated in the first paragraph of the affidavit, he cites the qualifications of why he is reliable on the identification of this marijuana, and where it is, and who it belongs to, and so I think on that basis that it is a sufficient search warrant.

MS. ZEEGERS: Your Honor, there are, basically, two problems with this case, (1) There was a warrantless

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MS. ZEEGERS (cont'd): search of the property before obtaining a search warrant, and there is also a problem with the validity of it.

THE COURT: Well, was this really a warrantless search?

MS. ZEEGERS: Yes, there was, Your Honor.

THE COURT: Or was it merely a verification of the informant?

MS. ZEEGERS: Your Honor, I believe that a search is defined by an intrusion onto a person's property, and that definition is further defined as to whether there is a reasonable expectation of privacy which was intruded upon by the government, and I believe --

THE COURT: You're saying that for all practical purposes, as far as this motion is concerned, we have no warrant?

MS. ZEEGERS: I am saying that we have a warrant, yes -- or for the first search we had no warrant, but we have a warrant based on an illegal search and seizure, and not based on probable cause,

because there are no underlying facts in the warrant stating that the informant was reliable or credible. So all we have here is a warrantless search, and an attempt to justify that search by obtaining a warrant. It is clear that the burden is on the State to prove for the warrantless search in the first instance that there was

[63]

MS. ZEEGERS (cont'd): probable cause and that there were exigent circumstances to go on the property. Let's look at probable cause. What they got here, they have got a suspicion of an unnamed informant, nothing in the affidavit, or nothing in the evidence, that says that this informant, in fact, is reliable or credible. They have only stated mere conclusions to that effect. The State has not proven that there

were exigent circumstances to go onto the land, they did go onto the land. As a matter of fact, the Officer stated that he waited three days before he even went onto the land. So again, I think in terms of the warrantless search, there is no justification for it.

THE COURT: Are you saying that the words "reliable cooperating citizen" is not enough?

MS. ZEEGERS: Yes, that is what I am saying.

THE COURT: And you are saying that from the Aguilar case?

MS. ZEEGERS: Yes, that's right. And I have said that in my memorandum. Also, there is nothing in this search warrant or in the testimony saying that this informant was any expert in knowing what marijuana was, or what it was not. As a matter of fact, the police officer himself said that he didn't know if he

was on Defendant Thornton's land, and neither did the informant when the informant told him that marijuana was growing back there.

THE COURT: Well, what if he was not on the land?

MS. ZEEGERS: Well, then that would be the issue that we would take up at trial.

THE COURT: Well, let's suppose for a moment that he was on this property where the mobile home was, and the house belonging to someone else, and let's suppose for the moment, that he observed the mesh enclosures from that property.

MS. ZEEGERS: If he had observed those mesh enclosures and saw, in fact, the marijuana growing from the neighbor's land, then according to State v. Peakes, then we could not claim any intrusion, but that is not the case here.

THE COURT: Well, what is the case here? Where did he observe the wire enclosures from? From the Thornton property itself?

MS. ZEEGERS: Yes, Your Honor. He was well onto the Thornton property when he observed it. The Officer has testified, and Mrs. Thornton has testified that these fenced-in areas could not be seen from the neighbor's property. They could not be seen from the road, and they could not be seen from the Defendant's driveway, you know, there may have been a problem with this case if they could see the marijuana growing on the property from the driveway pursuant to U.S. v. Hensel, but that is not the case here. Hensel. So what really happened here is, you know, the police

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MS. ZEEGERS (cont'd): got some

suspicion that there might have been marijuana growing back here, and they weren't sure whether it was Richard Thornton's land or not, but they decided to investigate it, and they investigated it without a warrant, and then they tried to base their warrant on another investigation, and that is something that is protected by the Fourth Amendment.

THE COURT: Assuming that the first visit to the property by the Officer was indeed a search?

MS. ZEEGERS: That's right.

THE COURT: Isn't that really the key issue in this case?

MS. ZEEGERS: Yes, I believe it is. I think I have discussed in my Memorandum of Law sufficiently why it is a search, and I will go over that with you --

THE COURT: No, if it is in your memorandum, it is not necessary.

You also discussed in your memorandum the impact, if any, of Spinelli on this case. Dealing with the informant?

MS. ZEEGERS: Yes, in that case, Your Honor, if it cannot be proved that the informant ~~was~~ reliable by corroborating testimony by the police officer, then the warrant could be valid; however --

THE COURT: And we don't have that kind of a

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THE COURT (cont'd): situation here?

MS. ZEEGERS: No, we don't. There has to be not an intrusion first. If they were going up and down the road and they saw people coming in and out with truckloads of marijuana, then that would be a situation, but the police have to be valid on the property first before Spinelli is taken into

account here, so that you cannot use your legal search to bolster your probable cause. I think that is quite clear.

THE COURT: If there was an illegal search.

MS. ZEEGERS: That's right.

THE COURT: I think I understand your position.

Mr. Alsop, do you have anything further?

MR. ALSOP: Yes, Your Honor. The probable cause, as I said, was based upon what Mr. Krandall saw and not what the informant saw, and we suggest that he did have a right to be there under Hester, and under that, or the Alfalfa Corporation, which was decided recently, that there is still an open field doctrine that is available.

THE COURT: There is no question but what there is an open field doctrine, but the question is, whether or not this case comes under the open field doctrine. This isn't the kind of fact situation that was contemplated by Hester, was it?

MR. ALSOP: That is a government agent going out

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MR. ALSOP (cont'd): into the woods seeing a still, I think, a very similar type situation.

THE COURT: But it was a question whether it was an open field or not, and whether or not it was within the curtilage.

MR. ALSOP: Well, that is the same issue here. We suggest that it is

not a curtilage, this was out in the woods, and for that very reason, it is not within the curtilage. The witness testified that the reason why they put it out in the woods was so that nobody could see it from the house, or from the road, or whatever. It is definitely not within the curtilage.

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Office of the Clerk
SUPREME COURT OF MAINE

No. 82-1273

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF MAINE,

Petitioner

v.

RICHARD THORNTON,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE MAINE SUPREME JUDICIAL COURT CORRECTLY CONSTRUED THE FOURTH AMENDMENT BY HOLDING THAT THE "OPEN FIELDS DOCTRINE" OF HESTER V. UNITED STATES, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), WAS INAPPLICABLE TO THE INSTANT CASE, WHERE A WARRANTLESS SEARCH WAS MADE BY POLICE OFFICERS OF MR. THORNTON'S HEAVILY WOODED 38-ACRE LAND AND WHERE MR. THORNTON MADE EVERY EFFORT TO CONCEAL HIS ACTIVITIES FROM THE PUBLIC AND WHERE THE POLICE OFFICERS WERE NEVER LEGITIMATELY ON DEFENDANT'S PROPERTY?

1 Petitioner incorrectly states in its Petition that the wooded area searched was "beyond the curtilage" of Mr. Thornton's house. The issue of whether the area searched was within the curtilage or not was never decided by the Maine Supreme Judicial Court.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton, decided on December 6, 1982, is found at Me., 453 A.2d 489 (1982) and is reproduced in the Appendix to this Petition. (A. 1) The opinion denied the State's appeal from a Maine Superior Court Order suppressing observations made and items seized at Mr. Thornton's property by the police. The Maine Superior Court Suppression Order is reproduced in Appendix to this Petition. (A. 9)

JURISDICTION

The judgment of the Maine Supreme Judicial Court in State of Maine v. Richard Thornton, Me., 453 A.2d 489 (1982) was decided and entered and the Court's mandate issued on December 6, 1982. Petitioner timely filed its Petition for Writ of Certiorari within the sixty-day filing period set forth in U.S. Sup. Ct. Rule 20.1.

Petitioner invoked the jurisdiction of the Supreme Court of the United States under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

An unidentified informant made a statement that he had been in a wooded area off the Davis Corner Road and had seen what he thought was marijuana growing in the back of a mobile home in the area (A. 2).² State Trooper Carroll E. Crandall and Hartland Constable Harold Hartford talked to the informant who did not want to be involved in the prosecutorial activity and who did not know who owned the property on which the marijuana was allegedly growing. (A. 3) This discussion took place on July 31, 1981. (R. 17, 19)³

On August 3, 1981⁴, Trooper Crandall and Constable Hartford left the Davis Corner Road and walked across the property between the mobile home and an adjacent house until they reached an overgrown woods road, used only as a footpath. The men continued up the woods road and found what they thought to be marijuana growing in two small clearings, fenced in with chicken wire. (A. 3) (R. 20) This entire area was heavily wooded, except for the two clearings with the alleged marijuana patches; it was not possible to see the patches from Mr. Thornton's house, from his driveway, from the public road, or from neighboring land. (A. 3) In fact, a person would have had to search to find a way to the patches. (A. 3)

An old stone wall and barbed wire fence and No Trespassing signs exist around the perimeter of Mr. Thornton's property,

² References are to the pages of the Appendix appearing at the end of this Brief appearing in parentheses as follows: (A. ____)

³ References are to pages of the Appendix filed by Mr. Thornton with the Supreme Judicial Court Brief which pages 12-81 of the Appendix refer to the hearing held on April 5, 1982, in the Maine Superior Court, Somerset County on Mr. Thornton's Motion to Suppress appearing in parentheses as follows: (R. ____). The referenced pages appear in the Appendix of this Brief.

⁴ The opinion of the Supreme Judicial Court states that the search took place on July 31, 1981, an apparent typographical error.

including a sign where the woods road enters Mr. Thornton's property. (A. 3) Mr. Thornton did not let people walk routinely through his property, and the officers had no consent to enter the property on August 3, 1981. (A. 3)

After determining in their opinion that the plants were marijuana, the officers left the property. (A. 3) Trooper Crandall checked maps at the Town Office to "find out for sure" who owned the property on which the plants were growing. Trooper Crandall then filed an Affidavit to obtain a Warrant to search Mr. Thornton's property for marijuana. Trooper Crandall based his belief of probable cause to search on his 1980 observation of marijuana on Mr. Thornton's property, on the August 3, 1981 observations, and on the information supplied by a "reliable, cooperating citizen". (A. 3), (R. 8), (A. 13) Trooper Crandall testified that he did not get a Warrant prior to the warrantless search because "I didn't know exactly where the marijuana was. I didn't know whose property it was on." (A. 3) Mr. Thornton was charged with furnishing marijuana pursuant to 17-A Maine Revised Statutes Annotated (M.R.S.A.) § 1106.

Pursuant to Mr. Thornton's Motion for Suppression of evidence, the Superior Court Justice found that because the District Attorney abandoned any effort to prove probable cause, based on the informant's testimony, that sufficient probable cause for a valid Warrant depended on Trooper Crandall's observations. (A. 3, 9, 10) The Justice further stated that the District Attorney had conceded that Trooper Crandall's initial visit was a warrantless search and that the central issue was a determination of whether the search came within an exception to the warrant requirement. (A. 3, 10)

The Superior Court Justice concluded that the two officers entered Mr. Thornton's property, which was posted with a number of signs prohibiting trespassing and hunting, by walking part way along Mr. Thornton's property and then crossing a stone wall.

(A. 3, 10). The officers entered the property without license in order to corroborate the informant's tip. (A. 3, 10, 11). The secluded, wooded location chosen by Mr. Thornton for the patches, and Mr. Thornton's efforts to exclude the public from his property evidenced his reasonable expectation of privacy on his property. (A. 3, 11). Because the officers were not innocently on public property, property of unknown ownership, or neighboring property and because no other exception to the warrant requirement was applicable, the Superior Court Justice found that the officers' visit to Mr. Thornton's property was an unlawful search. (A. 3, 4, 11). After finding that the information obtained from Trooper Grandall's 1980 search was stale in 1981 and may have also been obtained during an unlawful search and that the observations made during the August 3rd unlawful search could not supply probable cause, the Justice ruled that the Warrant issued for the search and seizure was invalid. (A. 4, 11). He, therefore, suppressed evidence of observations made and items seized on Mr. Thornton's property. (A. 4, 11, 12).

On appeal to the Maine Supreme Judicial Court, the State contended:

- (1) Three of the Superior Court Justice's findings of fact were clearly erroneous;
- (2) That Mr. Thornton could have had no reasonable expectation of privacy; and
- (3) That the Superior Court Justice erred in failing to apply the "open fields doctrine". (A. 4)

The Maine Supreme Judicial Court found that the first finding of fact that Mr. Thornton's property was posted with signs prohibiting trespassing and hunting was not clearly erroneous because Mr. Thornton's wife testified directly to the fact that such signs were posted on the property, and the defense also offered into evidence photographs of the No Trespassing sign. (A. 4)

The second finding of fact regarding whether or not officers went partly up Mr. Thornton's driveway was found not to be clearly erroneous because the Superior Court Justice was not compelled to accept the officers' testimony on the point, even if it was uncontradicted, and the Court also found that if the Superior Court's finding was erroneous, it was a harmless error. (A. 4)

The third finding of fact that the two officers crossed the stone wall in disrepair was also found not to be erroneous because of Mr. Thornton's wife's testimony regarding the stone wall. The Maine Supreme Judicial Court noted that "due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses." (A. 4, 5)

In addressing the State's contentions that Mr. Thornton had no reasonable expectation of privacy in the area searched, the Maine Supreme Judicial Court also accepted the findings of the Superior Court Justice that Mr. Thornton's effort to conceal the patches and to exclude the public from his land evidenced a reasonable expectation of privacy. (A. 5)

The Maine Supreme Judicial Court noted that it has never been the law of the State of Maine that any expectation of privacy for activity conducted in an area accessible to the public is, per se, unreasonable. Rather, the proper inquiry must be:

"[H]aving in mind the purposes to be served by the Fourth Amendment, made applicable to the States by the Fourteenth, should we not disregard such conclusory property law concept and determine the reasonableness of the police entry by responding to the following relevant inquiry, what under all the existing circumstances, if any, wholly defeated or partially reduced under the law, the reasonable expectation of privacy which the occupants ... had a right to entertain?" Crider, 341 A.2d at 5. (A. 6, 7) [Reference is to State v. Crider, Me., 341 A.2d. 1 (1975)]

Under the circumstances of this case, the Maine Supreme Judicial Court found nothing that could have been taken to have wholly defeated or partially reduced Mr. Thornton's reasonable expectation of privacy, except the visit by the officers to his

property for the specific and admitted purpose of gathering information for a subsequently procured Search Warrant. (A. 7)⁵

The Maine Supreme Judicial Court also found that the Superior Court Justice's conclusion concerning the availability of the "open fields doctrine" exception to the Search Warrant requirement under the circumstances was correct. (A. 7, 8) The Court noted that for the "open fields doctrine" to apply, two factual aspects of the circumstances must be considered:

(1) the openness with which the activity is pursued ...; and

⁵ The following testimony elicited by the prosecutor of Mrs. Thornton established that there was a subjective expectation of privacy in the area searched:

Q BY MR. ALSOP: Have you been out to these plots?
A MRS. THORNTON: Yes, I have.
Q And more than once during the course of the summer of 1981?
A Yes.
Q And were you aware of what was growing out there?
A Yes.
Q Is that in fact why they were growing out in that area?
A Yes.
Q Is it fair to say that you or your husband did not want it to be viewed from the road; is that true?
A True.
Q In fact, they were out in a well-wooded area?
A That's true.
Q And the fence around them was to keep out the animals?
A Anything that would bother it, not necessarily animals.
THE COURT: Police and things like that?
Q BY MR. ALSOP: Was it possible to see through the fence?
A If you looked through the fence, yes.
Q How do you get inside of those fences?
A Pull the wire down.
Q So there was no gate on it or anything of that sort?
A No. You would have to search to find your way in. (R. 67)

Mr. Thornton's attorney elicited the following statement from Mrs. Thornton:

Q BY MS. ZEEGERS: Have you or your husband ever allowed anyone to routinely walk through your property to get to anyone else's property, or to the road?
A MRS. THORNTON: No.
Q And you have not allowed hunters on your property?
A No. (R. 60)

(2) the lawfulness of the officers' presence during their observation of what is open in patent. (A. 7)

In the circumstances of this case, the Supreme Judicial Court found that the State could not demonstrate either requirement for the application of the "open fields doctrine". (A. 7)

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

- I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED PURSUANT TO U.S. SUP. CT. RULE 17.1(c) BECAUSE THE DECISION OF THE MAINE SUPREME JUDICIAL COURT IS CONSISTENT WITH QUESTIONS OF FEDERAL LAW SETTLED BY THIS COURT.

The Petitioner incorrectly states that the Maine Supreme Judicial Court held that the property searched was "beyond the curtilage of a home". (Petitioner's Brief at 14) In the present case, the Maine Supreme Judicial Court did not hold that the area searched was beyond the curtilage. (See footnote 1 supra)

However, even if the property search were determined to be beyond the curtilage of Mr. Thornton's home, the decision of the Maine Supreme Judicial Court in the present case is one that has been settled by this Court. Petitioner states at page 16 of its Brief that the Maine Supreme Judicial Court interpreted the Fourth Amendment to permit people to invoke its protections for illicit activities conducted beyond the curtilage of their home by simply posting and fencing their property. This conclusion is erroneous. First, there was no holding that the area searched was beyond the curtilage. Second and more importantly, the Supreme Judicial Court made a thorough analysis of the Hester and Katz doctrines reconciling its decision to be consistent with both of those doctrines. Hester v. United States, 265 U.S. 57,

44 S.Ct. 445, 68 L.Ed. 898 (1924), Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

In the present case, the Maine Supreme Judicial Court held that for the "open fields doctrine" to apply, two factual aspects of the circumstances must be considered:

- (1) The openness with which the activity is pursued, Peakes, 440 A.2d at 353...; and
- (2) The lawfulness of the officers' presence during their observations of what is open and patent. Dow, 392 A.2d at 535...Under the circumstances, The State must demonstrate the legitimacy of the officers' position of observation and the openness of the conduct in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute a search. (A. 7) [State v. Peakes, Me., 440 A.2d 350 (1982); State v. Dow, Me., 392 A.2d 532 (1978)] (A. 7)

The Court held that in the circumstances of this case, the State could not demonstrate either requirement for the application of the "open fields doctrine". (A. 7) The Court found that Mr. Thornton made every effort to conceal his activity, that nothing about his enterprise was open, patent or knowingly exposed to the public. (A. 7). In addition, the Court found that the officers were never legitimately on Mr. Thornton's property; that they entered Mr. Thornton's land without a Warrant, and with no exception to the warrant requirement, for the specific purpose of verifying information to be used ultimately against him. (A. 7, 8)

The Supreme Judicial Court further noted that the State made an erroneous assumption that the "heavily wooded" area searched was an area akin to an "open field". The Supreme Judicial Court stated that the State's erroneous assumption precluded the need for further Fourth Amendment analysis. The Court stated:

"The determination of a lawful search and seizure under Fourth Amendment analysis does not involve plugging in one of several mutually exclusive theories or doctrines, such as the "open fields" doctrine, depending on the particular facts. Surely, a determination

of Fourth Amendment protection involves a more cohesive and reasoned approach." (A. 8)

The Maine Supreme Judicial Court carefully stated that the Hester and Katz doctrines must be reconciled, noting that under both analyses, the reasonableness of any subjective expectation of privacy would be questioned. (A. 8)

"There is little doubt that the Katz majority would have agreed that Hester had no reasonable expectation of privacy in distributing moonshine whiskey in an open field on his father's land. Katz, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed. 2d at 588 (Harlan, J., concurring)" (A. 8)

The Maine Supreme Judicial Court stated that the point was not that the area of the marijuana patches was accessible to the public or that under different circumstances, Mr. Thornton's land might have been open woods. The dispositive point was that the actions of Mr. Thornton indicated that he expected his land to be a private place. (A. 8)

Mr. Thornton's subjective expectation of privacy was not found to have existed simply because the field was posted and fenced as Petitioner contends in its Brief at page 18. (See footnote 4 supra)

The fact that the Fourth Amendment does not apply to "open fields" pursuant to Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) is irrelevant to the present case. As the Maine Supreme Judicial Court noted, the area searched is not akin to an open field.

The fact that the United States Supreme Court granted Certiorari in the case of Florida v. Brady, et al., 379 So.2d 1294 (Fla. App. 1980), cert. granted 50 U.S.L.W. 3864 (U.S. May 24, 1982), (No. 81-1636) does not compel the granting of Certiorari in the present case. Brady involved the search of an 1800 acre area of open fields where the only apparent testimony regarding a reasonable expectation of privacy was the fact that No Trespassing

signs and a fence encircled the property. In the present case, other testimony revealed that Mr. Thornton himself did have a subjective reasonable expectation of privacy beyond the signs and the fence. (See footnote 4, supra) Also, the Court in Brady implied that Hester, supra was no longer viable.

In reaching its conclusion the First District ignored the United States Supreme Court's shift to a reasonable right of privacy test and reverted to the Hester, supra, view of fourth amendment property rights around the dwelling house and curtilage, regardless of whether the surrounding fields were fenced. 379 S.2d. 1294 at 1296 (footnote omitted).

Much of the confusion regarding the open fields doctrine has arisen not from a lack of ruling on the part of this Court but in a failure to distinguish between the holding in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 and the birth of the open fields doctrine in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

In Hester, supra., this Court held that federal agents could trespass on an area where the public was not excluded during a warrantless search and view that which was exposed to the public without violating the Fourth Amendment. That which is observable by the public is observable by a federal agent without a warrant. 265 U.S. 57 (One must note, however, that in the present case, the Maine Supreme Judicial Court determined that the public was excluded on Mr. Thornton's land, and the land was not exposed to the public).

The following year, the open fields doctrine was born in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928). The doctrine is a combination of the "open field" phrase coined in Hester and Olmstead's holding that the Fourth Amendment is not violated unless there has been "an actual physical invasion of a house 'or curtilage' for the purpose of making a seizure." Olmstead, 277 U.S. at 466.

After the decision in Olmstead, the Hester holding could best be stated as follows: the open field area beyond the curtilage is not an area entitled to Fourth Amendment protection. The Olmstead open fields doctrine's core, therefore, was that an open field was not a "constitutionally protected area."

However, Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 overruled the Fourth Amendment "constitutionally protected area" or actual physical invasion analysis epitomized by Olmstead. Katz holds that "the Fourth Amendment protects people--and not simply 'areas'--against unreasonable searches and seizures." Id. at 353, 88 S.Ct. at 512. However, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. Id. at 351, 88 S.Ct. at 511.

Therefore, the present case, as stated above, is not inconsistent with either Hester or Katz and if it is inconsistent with Olmstead, it is only inconsistent with that portion of Olmstead which has been overruled with this Court. Therefore, the Federal Constitutional issues in the present case have been decided by this Court.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED PURSUANT TO U.S. SUP. CT. RULE 17.1(b) BECAUSE THE DECISION OF THE MAINE SUPREME JUDICIAL COURT IS NOT IN CONFLICT WITH A DECISION OF THE FEDERAL COURT OF APPEALS.

The decision of the Maine Supreme Judicial Court in State of Maine v. Richard Thornton, supra, is not in conflict with the opinion and decision in United States v. Oliver, 686 F. 2d 356 (6th Cir. 1982) cert. granted 51 U.S.L.W. 3156 (U.S. January 24, 1983), (No. 82-15). Oliver is distinguishable from the present case. In Oliver, the 6th Circuit Court of Appeals overturned the

decision of a panel of that Court which held that the officers who conducted a warrantless search, which included traveling approximately a mile and a half on the landowner's private road, past "No Trespassing" signs, and walking around a locked gate to view growing fields of marijuana violated the landowner's expectation of privacy guaranteed by the Fourth Amendment, 686 F.2d. 356 at 358. However, even the 6th Circuit used the same analysis as the Maine Supreme Judicial Court did in Thornton in reconciling Hester with Katz, by citing the two-prong analysis for determining a reasonable expectation of privacy:

...generally, as here, the answer to that question requires reference to a "place". My understanding of the Rule that has emerged from prior decisions is that there is a two-fold requirement, first, that a person has exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as "reasonable". Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." cf. Hester v. United States, supra... Id. 389 U.S. at 361, 88 S.Ct. at 516. (U.S. v. Oliver, supra, 686 F.2d. 356 at 359, 360)

In Oliver v. United States, supra., it is important to note that the reasonable expectation of privacy was based largely on the fact that narcotics agents passed "No Trespassing" signs and a locked gate in making the search. (See footnote 4 at 686 F.2d. at 360) However, in the present case, there was other testimony indicating that Mr. Thornton had a reasonable expectation of privacy beyond the signs and fences. (See footnote 4, supra)

Also in Oliver, the officers found the marijuana approximately a mile and a half from the Defendant's house by going on a "gravel road". In contrast, the patches were found on the Thornton property by going up an overgrown "footpath" only approximately one hundred and fifty feet away from Mr. Thornton's driveway. (R. 58, 59)

Finally, in Oliver, the area where marijuana was found was in fact "open" and was a field. In the present case, the area searched was in no way open, as the area was heavily wooded.

It is clear that because of the size of the area of the Defendant's land in United States v. Oliver, supra, that the Court compared it with a desert island or mountain top areas which are remote, with no connection with anyone's residence. (686 F.2d at 360) However, in the present case, the residence of Mr. Thornton was only a short distance away from the area searched.

The 6th Circuit in Oliver held that:

"...Under Hester and Katz, any expectation of privacy that an owner might have with respect to his open field is not, as a matter of law, and expectation that society is prepared to recognize is reasonable... (686 F.2d at 360)

This, however, does not mean that the decision in Thornton is inconsistent with Oliver's holding. The Court in Oliver did not say that a court should not investigate the circumstances to determine whether in fact there was an "open field". In the present case, using the two-prong analysis of Katz adopted by Oliver, the Maine Supreme Judicial Court simply determined that there was no open field, and then proceeded to determine whether there was a reasonable expectation of privacy in the "closed woods" searched. Therefore, State of Maine v. Richard Thornton, supra, is not inconsistent with United States v. Oliver, supra.

In addition, if the holding in Oliver were determined to be inconsistent with the present case, it is contended that this Court should not grant certiorari in the present case because the decision in Oliver is contrary to the decisions of the First Circuit which includes this State.⁶ See United States v. Miller.

⁶ The Oliver decision (May 5, 1982) was not rendered when State v. Thornton was argued before the Maine Superior Court (February 23, 1982), nor was Oliver reported when the Maine Supreme Judicial Court heard arguments on Thornton (September 22, 1982).

589 F.2d 1117, 1125 (1st Cir. 1973), cert denied, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979) (no reasonable expectation of privacy because boat like automobile, carries lesser expectation of privacy than home or office); United States v. Taylor, 515 F.Supp. 1321, 1326 (D.Me. 1981) (no reasonable expectation of privacy in film delivered to commercial establishment for developing); United States v. Hensel, 509 F.Supp. 1376 (D.Me. 1981) (no reasonable expectation of privacy in Maine beach; "open fields" expectation applies); United States v. Balsamo, 468 F.Supp. 1363, 1378 (D.Me.1979) (standing to contest a search depends on defendant's legitimate and reasonable expectation of privacy). In addition, the Oliver decision is also contrary to the decisions of the Second, Fourth, Fifth, Seventh and Tenth Circuits who rejected the per se rule. United States v. Oliver, supra, at 686 F.2d 356, at 361. (Keith, dissenting)

It is significant to note that the Maine Supreme Judicial Court in Thornton explored all of the above decisions, some of which applied the open fields doctrine in determining that the open fields doctrine did not apply.

Finally, the Maine Supreme Judicial Court did not hold that the open fields doctrine was no longer the law in Maine, nor that Katz, supra had overruled the doctrine. To the contrary, the Supreme Judicial Court cited in Thornton numerous cases where the open fields doctrine was applied to Maine cases, and stated flatly that the Hester doctrine remains viable:

We have recently noted that after Katz, the "Hester doctrine remains entirely intact" in Maine and elsewhere. Dow, 392 A.2d at 536; 453 A.2d 489 at 495. (A. 8)
[Referring to State v. Dow, Me., 392 A.2d. 532 (1978)]

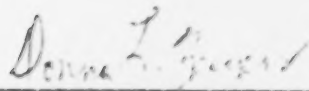
Therefore, there is no inconsistency in Thornton with any Federal Circuit Court of Appeals decision.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Dated: March 9, 1983

Respectfully submitted,



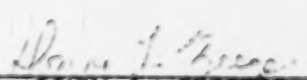
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CERTIFICATE OF SERVICE

I, Donna L. Zeegers, Esq., hereby certify that I have caused three (3) copies of the foregoing "Brief in Opposition to Petition for Certiorari" to be served upon Wayne S. Moss, Petitioner's Attorney of Record, by depositing them in the United States Mail, postage prepaid, addressed as follows:

Wayne S. Moss
Assistant Attorney General
Criminal Division
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Dated at Augusta, Maine, this 9th day of March, 1983.



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APPENDIX

STATE of Maine

v.

Richard THORNTON.

Supreme Judicial Court of Maine.

Argued Sept. 22, 1982.

Decided Dec. 8, 1982.

State appealed from an order of the Somerset County Superior Court granting defendant's motion to suppress observations made and items seized at defendant's property by the police. The Supreme Judicial Court, Carter, J., held that: (1) the evidence was sufficient to sustain the findings that the officers were not properly on property open to the public, were not on property of unknown ownership, and were not lawfully on neighboring property; (2) defendant had a clear expectation of privacy where he chose a spot for the marijuana patches which was observable only from his land, he posted no trespassing and no hunting signs on his land, and he generally excluded the public from his land, and thus the officers' warrantless search was an unreasonable invasion of defendant's privacy; and (3) the "open fields" doctrine was not applicable to justify the observation of the marijuana by the officers.

Affirmed.

1. Criminal Law —1158(4)

Findings of fact supporting suppression order by a superior court justice will not be set aside unless clearly erroneous.

2. Criminal Law —394.6(4)

In proceeding on defendant's motion to suppress observations made and items seized at defendant's property on which marijuana was growing, evidence was sufficient to sustain the findings that the police officers were not properly on property open to the public, were not on property of unknown ownership, and were not lawfully on neighboring property. U.S.C.A. Const. Amend. 4.

3. Searches and Seizures —7(10)

Depending on circumstances and conduct of the individuals, it is entirely possible to have a reasonable expectation of privacy in a public phone booth and an unreasonable expectation of privacy at home. U.S. C.A. Const. Amend. 4.

4. Searches and Seizures —7(20)

Defendant had a reasonable expectation of privacy in his land on which marijuana was growing where he chose a spot for the marijuana patches that was observable only from his land, he posted no trespassing and no hunting signs on his land, and he generally excluded the public from his land, and thus officers' warrantless search of the property was an unreasonable invasion of defendant's privacy which also tainted subsequent warrant and search. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures —7(10)

For the "open fields" doctrine to apply, two factual aspects of circumstances must be considered: first, openness with which the activity is pursued, and second, lawfulness of the officers' presence during their observations of what is open and patent. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures —7(10)

Although an activity may be observed, because, for example, it is conducted outside, participants may still have an expectation of privacy; under such circumstances, state must demonstrate legitimacy of the

officers' position of observation and openness of the conduct in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute a search. U.S. C.A. Const. Amend. 4.

7. Searches and Seizures —7(20)

"Open fields" doctrine was not applicable to justify observation by police officers of marijuana patches on defendant's land where defendant made every effort to conceal his activity, and officers were never legitimately on defendant's property since they entered the land without a warrant and within no exception to the warrant requirement for specific purpose of verifying information to be used against defendant. U.S.C.A. Const. Amend. 4.

David W. Crook (orally), Dist. Atty. (orally), John Alsop, Asst. Dist. Atty., Skowhegan, Edward Morin, Law Student, for plaintiff.

Doyle, Fuller & Nelson, Donna Zeegers (orally), Augusta, for defendant.

Before McKUSICK, C.J., and GODFREY, NICHOLS, ROBERTS, CARTER, VIOLLETTE and WATHEN, JJ.

CARTER, Justice.

The defendant was charged with unlawfully furnishing scheduled drugs in violation of 17-A M.R.S.A. § 1106 (1981). The defendant filed a motion to suppress the observations made and the items seized at the defendant's property by the police. After a suppression hearing in Superior Court (Somerset County), the justice granted the defendant's motion. The State appeals, pursuant to 15 M.R.S.A. § 2115-A (Supp. 1979) and Rule 37B, M.R.Crim.P., the suppression order. We deny the appeal.

An unidentified informant contacted Hartland Constable Arnold Hartford. The informant stated that he had been in a wooded area off the Davis Corner Road and had seen what he thought was marijuana growing in back of a mobile home in the area. Hartford contacted State Trooper

Crandall. Both officers talked to the informant, who did not want to be involved in any prosecutorial activity and who did not know who owned the property on which the marijuana was growing.

On July 31, 1981, Trooper Crandall and Constable Hartford left the Davis Corner Road and walked across the property¹ between the mobile home and an adjacent house until they reached an overgrown woods road, used only as a footpath. The men continued up the woods road and found marijuana growing in two clearings fenced in with chicken wire. This entire area was heavily wooded, except for the two clearings for the marijuana patches; it was not possible to see the patches from the defendant's house, from his driveway, from the public road, or from neighboring land. In fact, a person would have had to search to find the way to the patches.

An old stone wall, an old barbed wire fence and No Trespassing signs exist around the perimeter of the defendant's property, including a sign where the woods road enters the defendant's property. It was, however, possible to enter the defendant's property without observing anything except the stone wall. The defendant did not let people walk routinely through his property and the officers had no consent to enter the property on July 31, 1981. Although Trooper Crandall did not observe any boundaries or signs indicating the limits of the defendant's property, Trooper Crandall "figured" the marijuana was growing on the defendant's property because Crandall had observed marijuana on defendant's property in 1980.

After determining that the plants were marijuana, the officers left the property. Trooper Crandall checked maps at the Town Office to "find out for sure" who owned the property on which the plants were growing. On August 3, 1981, Trooper Crandall filed an affidavit and obtained a warrant to search the defendant's property

for marijuana. Trooper Crandall based his belief of probable cause to search on his 1980 observations of marijuana on the defendant's property, on the July 31, 1981 observations, and on the information supplied by a "reliable, cooperating citizen." When asked by the suppression court justice why a warrant had not been procured before the July 3, 1981 visit to the property, Trooper Crandall replied: "I didn't know exactly where the marijuana was. I didn't know whose property it was on, and I didn't feel without checking it that I had enough information." Later, on August 3, 1981, the officers returned to the clearings on the defendant's property and seized the marijuana.

In his order, the suppression court justice found that because the District Attorney had abandoned any effort to prove probable cause for the warrant based on the informant's testimony, sufficient probable cause for a valid warrant depended on Crandall's observations. The justice further found that because the District Attorney had conceded that Crandall's July 31 visit was a warrantless search, the central issue in the motion to suppress determination was whether the July 31 search came within an exception to the warrant requirement.

The suppression court justice concluded that the two officers had entered the defendant's property, which was posted with a number of signs prohibiting trespassing and hunting, by walking part way along the defendant's property and then crossing a stone wall, which was in a state of disrepair. The officers entered the property without license in order to corroborate the informant's tip. The secluded location, chosen by the defendant for the patches, and the defendant's efforts to exclude the public from his property evidenced the defendant's reasonable expectation of privacy on his property. Because the officers were not innocently on public property, property of unknown ownership, or neighboring proper-

defendant's driveway to approach the patches. Crandall denied making that statement; Hartford initially did not remember but later denied making the statement.

1. At the hearing, defense counsel tried to elicit testimony from both Crandall and Hartford that they had told counsel during telephone conversations that they had walked up the de-

ty, and because no other exception¹ to the warrant requirement was applicable, the justice found that the officers' July 31 visit to the defendant's property was an unlawful search. After finding that the information obtained in Crandall's 1980 search was stale in 1981 and may also have been obtained during an unlawful search and that the observations made during the July 31 unlawful search could not supply probable cause, the justice ruled that the warrant issued for the August 3 search and seizure was invalid. He, therefore, suppressed evidence of observations made and items seized on the defendant's property on August 3.

On appeal, the State contends: (1) three of the suppression court justice's findings of fact are clearly erroneous; (2) the defendant could have had no reasonable expectation of privacy; and (3) the suppression justice erred in questioning and failing to apply the "open fields" doctrine. We disagree.

1. Findings of Fact

(1) The State challenges as clearly erroneous three findings of fact by the suppression justice. Findings of fact supporting a suppression order by a Superior Court justice will not be set aside unless clearly erroneous. *State v. Dunlap*, 395 A.2d 821 (Me.1978). The justice found that the defendant's property was posted with signs prohibiting trespassing and hunting. The defendant's wife testified directly to the fact that such signs were posted on the defendant's property. The defense also offered in evidence a photograph of a No Trespassing sign on the defendant's property.

2. The burden was on the state to prove an exception to the warrant requirement. *State v. Linscott*, 416 A.2d 235, 239 (Me.1980); *State v. Dunlap*, 395 A.2d 821, 824 (Me.1978).

The five basic exceptions include: consent, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); incident to a lawful arrest, *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); probable cause and exigent circumstances, *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); hot pursuit, *Warden v.*

(2) Second, the justice found that the two officers went partly up the defendant's driveway en route to the marijuana patches during the July 31 visit. In fact, the officers denied using that driveway. Evidence was introduced that they had used some driveway. The suppression justice was not compelled to accept the officer's testimony on the point, even if it was uncontradicted. *Qualey v. Fulton*, 422 A.2d 773, 775 (Me.1980). The suppression court's finding, even if erroneous, was, however, harmless error. M.R.Crim.P., Rule 52(a); *State v. True*, 438 A.2d 460, 467 (Me.1981) (preserved error harmless if 'appellate court believes it highly probable that the error did not affect the judgment'). Even absent this finding, there was sufficient evidence to support the justice's conclusions that the officers were not properly on property open to the public, were not on property of unknown ownership, and were not lawfully on neighboring property. This evidence included the findings that the property was posted and surrounded by a wall; that Crandall "figured" the marijuana was on the defendant's property; that Crandall had seen marijuana on the defendant's property in 1980; that Crandall wanted to check the property in order to get more information for the warrant; and that the marijuana patches could not be seen from neighboring land.

Third, the justice found that the two officers crossed a stone wall in disrepair when entering the defendant's property. The defendant's wife testified that although the stone wall was dilapidated, a person would know he was going over a wall when entering the property in the area where the officers entered the property.

Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); and stop and frisk, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The "plain view doctrine" is not an exception to the warrant requirement. Rather, this doctrine allows the police to seize evidence in plain view, inadvertently observed by the police while lawfully searching with respect to another crime or purpose. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, reh'g denied, 404 U.S. 874, 92 S.Ct. 28, 30 L.Ed.2d 120 (1971).

Trooper Crandall's testimony that he did not see any fences or boundaries did not compel rejection by the suppression justice of the testimony of the defendant's wife. The finding of the justice was not clearly erroneous. *State v. McKenzie*, 161 Me. 123, 134-35, 210 A.2d 24, 31 (1965) (clearly erroneous test is that "'due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'").

II. Reasonable Expectation of Privacy

The suppression court justice found that the defendant's effort to conceal the patches and to exclude the public from his land evidenced a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The officers' warrantless search was, therefore, an unreasonable invasion of the defendant's privacy. *State v. Blais*, 416 A.2d 1253, 1256 (Me.1980). This violation of the defendant's fourth amendment rights also tainted the subsequent warrant and search. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The State relies on *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924); *State v. Peakes*, 440 A.2d 350 (Me.1982); and *State v. Dow*, 392 A.2d 532 (Me.1978) and argues that the defendant could not have a reasonable expectation of privacy in an area accessible to the public because fourth amendment protection does not extend to "open fields" and similar areas. The State concludes, therefore, that there was no search by the officers on July 31,³ *Peakes* 440 A.2d at 353; that they observed only what was "open and patent," *State v. Poulin*, 268 A.2d 475, 480 (Me.1970), and that these observations provided the basis for a valid search warrant used on August 3.

3. In his order, the suppression court justice stated that the District Attorney had conceded that the July 31 visit was a warrantless search and that the only issue was whether an exception to the warrant requirement applied. Although the State disputes this finding, the following exchange indicates either a concession on, or a waiver of, the issue of the occurrence of a search:

The State misconstrues these cases. In *Katz*, the Court made clear that the fourth amendment protection against unreasonable searches and seizures is a function of an individual's expectation concerning his activities and the reasonableness of those expectations: "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection ... [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582; *State v. Sweett*, 427 A.2d 940, 946 (Me. 1981).

In his concurrence in *Katz*, Justice Harlan recognized that the majority's seeming personalization of the fourth amendment was not inconsistent with the prior cases. Citing *Hester*, Justice Harlan reasoned that activities conducted in the open are not protected because even if there was an expectation of privacy, the expectation would be unreasonable. 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588.

The Maine cases are in accord. We noted after *Katz* that

[t]he issue of whether government action does or does not constitute a search is now understood to depend less upon the designation of an area ... than upon a determination of whether the examination is a violation of privacy on which the individual justifiably relied as secure from invasion.

State v. Gallant, 308 A.2d 274, 278 (Me. 1973) (radiographic scanning by customs of official mail entering country not search); *United States v. Miller*, 589 F.2d 1117, 1125 (1st Cir.1978), cert. denied, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979) (no reason-

[Defense counsel]: Your Honor, the affidavit of the police officer states that he went into the property and saw the marijuana, and then got a search warrant, it is fairly clear.

[Prosecutor]: There is no question but what that happened.

The Court: You have the burden of going forward, in that event, [Prosecutor].

[Prosecutor]: Yes, Your Honor.

able expectation of privacy because boat, like automobile, carries lesser expectation of privacy than home or office); *United States v. Taylor*, 515 F.Supp. 1321, 1326 (D.Me.1981) (no reasonable expectation of privacy in film delivered to commercial establishment for developing); *United States v. Hensel*, 509 F.Supp. 1376 (D.Me.1981) (no reasonable expectation of privacy in Maine beach; "open fields" expectation applies); *United States v. Balsamo*, 468 F.Supp. 1363, 1378 (D.Me.1979) (standing to contest a search depends on defendant's legitimate and reasonable expectation of privacy); *Peakes*, 440 A.2d at 352-53 (officer's observation of defendant's marijuana from neighbor's land not search); *State v. Sapiel*, 432 A.2d 1262, 1266 (Me.1981) (officer's proper entry on premises not violation of justifiable property interest; observation of evidence in plain view not search); *State v. Rand*, 430 A.2d 808, 818 (Me.1981) (absent exigent circumstances, fact that police are conducting official investigation does not justify intrusion on private property in breach of reasonable expectation of privacy); *Sweatt*, 427 A.2d at 945 (legitimate expectation of privacy in safe and contents; secrecy is not requisite for legitimate expectation of privacy); *State v. Albert*, 426 A.2d 1370, 1373 (Me.1981) (any conceivable expectation of privacy with respect to car had ceased when police searched three weeks after car had left defendant's possession and control); *Blais*, 416 A.2d at 1256 (no search warrant required if State establishes absence of any reasonable expectation of privacy); *State v. Johnson*, 413 A.2d 931, 933 (Me.1980) (knowledge of dead body on premises created exigent circumstances permitting warrantless entry); *State v. Littlefield*, 408 A.2d 695, 697 (Me.1979) (no search when defendant observed walking along public street); *State v. Barclay*, 398 A.2d 794, 798 (Me.1979) (necessary difference between search of store or dwelling house and search of ship, boat, wagon or car); *State v. Dow*, 392 A.2d 532, 535 (Me.1978) ("[o]pen, obvious and notorious criminal activity conducted in a public place has never been accorded constitutional protection under the fourth amendment"; warden's observations

of short lobsters open to public view not search); *State v. Cowperthwaite*, 354 A.2d 173, 175-76 (Me.1976) (observation of shotgun, cartridge, and hunting knife by officer standing at open door of vehicle not search); *State v. Hamm*, 348 A.2d 268, 272 (Me.1975) ("[t]he Court in *Katz* broadened the scope of fourth amendment protection to include those areas which the individual attempts 'to preserve as private'"); *State v. Crider*, 341 A.2d 1, 4 (Me.1975) (no invasion of privacy when police enter without force common hallway of multiple-unit dwelling in furtherance of investigation); *State v. Koucoules*, 343 A.2d 860, 868 (Me.1974) (search exceeding bounds of consent to search becomes invasion of privacy rendering search unreasonable); *State v. Richards*, 296 A.2d 129, 134 (Me.1972) (governmental rummaging about in citizen's belongings, even without purpose of seeking criminal violations, is search); *State v. Stone*, 294 A.2d 683, 688-89 (Me.1972) (rifle on back seat of automobile was knowingly exposed to public view; observation not unconstitutional intrusion into protected area); *Poulin*, 268 A.2d at 480 (observation of safe in open automobile trunk not search); *McKenzie*, 161 Me. at 137, 210 A.2d at 32 (not search to observe that which is open and patent).

[3,4] Depending on the circumstances and the conduct of the individuals, it is entirely possible to have a reasonable expectation of privacy in a public phone booth, *Katz*, 389 U.S. at 348, 88 S.Ct. at 509, 19 L.Ed.2d at 580, and an unreasonable expectation of privacy at home. *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), *reh'g denied*, 386 U.S. 939, 87 S.Ct. 951, 17 L.Ed.2d 811 (1967). In the present case, the defendant's conduct evidenced a clear expectation of privacy. He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.

It has never been the law in this State that any expectation of privacy for activity conducted in an area accessible to the public

is *per se* unreasonable. Rather, the proper inquiry must be

(h)aving in mind the purposes to be served by the Fourth Amendment, made applicable to the states by the Fourteenth, should we not disregard such conclusory property law concept and determine the reasonableness of the police entry by responding to the following relevant inquiry, what under all the existing circumstances, if anything, wholly defeated or partially reduced under the law the reasonable expectations of privacy which the occupants ... had a right to entertain?

Crider, 341 A.2d at 5. Under the circumstances of this case, we find nothing that can be taken to have wholly defeated or partially reduced the defendant's reasonable expectation of privacy except the visit by the officers to the property for the specific and admitted purpose of gathering information for a subsequently procured search warrant.

III. The "Open Fields" Doctrine

The State contends, finally, that (1) the suppression court justice clearly erred in apply the "Katz expectation of privacy analysis" to this case because the case is governed by the "'open fields' doctrine analysis developed in *Hester* ..."; and (2) the justice clearly erred in questioning the viability of the doctrine of *Hester*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. In his order, the justice did observe, parenthetically, that "[t]he extent to which the open fields doctrine is still viable after *Katz* ... is open to considerable doubt." This observation was preceded, however, by the finding that neither "the plain view or open fields exception to the warrant requirement is applicable."

We have recently noted that after *Katz*, the "*Hester* doctrine remains entirely intact" in Maine and elsewhere. *Dow*, 392 A.2d at 536. Regardless of his estimations of the doctrine's viability, the suppression justice applied the law of the State and found inapplicable the "open fields" exception to the warrant requirement. His conclusion concerning the availability of this

exception under these circumstances was correct.

(5) In Maine, for the "open fields" doctrine to apply, two factual aspects of the circumstances must be considered: (1) the openness with which the activity is pursued, *Peakes*, 440 A.2d at 353 ("the officers observed something which was 'open and patent' to the Defendant's neighbors and their invitees"); *Dow*, 392 A.2d at 535 (open, obvious criminal activity conducted in public place not constitutionally protected); and (2) the lawfulness of the officers' presence during their observations of what is open and patent. *Dow*, 392 A.2d at 535 ("[t]he warden, who apparently had as much right to be in the parking lot as the defendant, merely observed that which was completely open to public view ..."); *Peakes*, 440 A.2d at 353 ("the Waldoboro officers had permission to be where they were when they saw the marijuana plants"); *Stone*, 294 A.2d at 689 ("without any unlawful initial intrusion into the interior of the automobile, Trooper Smith saw, as knowingly exposed to public view (even though inside the automobile) a 30 calibre carbine rifle ...").

(6, 7) Although an activity may be observed, because, for example, it is conducted outside, the participants may still have, as in this case, an expectation of privacy. *Katz*, 389 U.S. at 351-52, 88 S.Ct. at 511, 19 L.Ed.2d at 582. Under such circumstances, the State must demonstrate the legitimacy of the officers' position of observation and the openness of the conduct in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute a search. In the circumstances of this case, the State can demonstrate neither requirement for the application of the open fields doctrine. The defendant made every effort to conceal his activity; nothing about his enterprise was open, patent, or knowingly exposed to the public. Secondly, the officers were never legitimately on the defendant's property; they entered the defendant's land without a warrant, and within no

exception to the warrant requirement, for the specific purpose of verifying information to be used, ultimately, against him.

Further, we note that the State's erroneous assumption that the fact that the scene of the criminal activity occurred in an area akin to an "open field" precludes the need for further fourth amendment analysis. The determination of a lawful search and seizure under fourth amendment analysis does not involve plugging in one of several mutually exclusive theories or doctrines, such as the "open fields" doctrine, depending on the particular facts. Surely a determination of fourth amendment protection involves a more cohesive and reasoned approach.

Although separated by forty-three years, the *Hester* doctrine and the *Katz* doctrine can be reconciled; indeed, such reconciliation is required. *Dow*, 392 A.2d at 536; *State v. Brady*, 379 So.2d 1294, 1295 (Fla. 1980) ("*Katz* did not rule out the open fields of *Hester* altogether"). Under both analyses, the reasonableness of any subjective expectation of privacy would be questioned: "the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out." - *Brady*, 379 So.2d at 1295. There is little doubt that the *Katz* majority would have agreed that *Hester* had no reasonable expectation of privacy in distributing moonshine whiskey in an open field on his father's land. *Katz*, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588 (Harlan, J., concurring).

The point is not that the area of the marijuana patches was accessible to the public, *Katz*, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588 (Harlan, J., concurring), or that, under different circumstances, the defendant's land might have been open woods. The dispositive point is that by his actions the defendant indicated that he expected his land to be a private place. Under these facts, we think that that expectation was reasonable. Trooper Crandall "figured" the marijuana was on the defendant's land. The two officers walked

directly to the chicken-wire enclosures; it was not possible to observe the patches except from such close proximity. The officers were "checking" the property, without permission or authority, to ensure "enough information." This conduct was a search; the State has not proved the reasonableness of this search. *Linacott*, 416 A.2d at 259. An unreasonable search, under every doctrine and theory, is proscribed by the fourth amendment.

The entry is:

Judgment affirmed.

All concurring.

STATE OF MAINE
SOMERSET, SS

SUPERIOR COURT
CRIMINAL ACTION
Docket No. CR82-10

STATE OF MAINE
vs.
RICHARD THORNTON

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)
)
)
)

ORDER

This criminal action is before the Court upon the defendant's motion to suppress the fruits of a search of his property in Hartland, Maine, conducted by law enforcement officers on August 3, 1981, pursuant to a search warrant issued that day.

At the hearing on April 5, 1982, the Court heard the testimony of the affiant officer, Trooper Carol Crandall, Constable Harold Hartford, and Linda Thornton, the defendant's wife. The affidavit indicates that, relying upon information supplied by a "reliable cooperating citizen," who claimed to have observed marijuana plants growing in a penned area in woods behind the defendant's residence on the Davis Corner Road, Hartland, Trooper Crandall went to that area of the defendant's property on July 31, 1981 and discovered marijuana plants to be growing. Additionally, the affidavit claims that approximately one year previously, that is, in the summer of 1980, Trooper Crandall had observed marijuana growing on other locations on the defendant's property. Constable Hartford accompanied Trooper Crandall on his visit to the Thornton property on July 31, 1981.

The District Attorney, at the hearing on this motion, abandoned any claim that the informant citizen was reliable and credible enough that his information, standing alone, constituted probable cause for the warrant which issued. At any rate, no evidence as to the grounds upon which that informant's reliability or credibility could be established, or any evidence of corroborating circumstances as to the informant's observations, appears in the affidavit or

was introduced at the hearing, beyond a conclusionary allegation of reliability. Absent such support for the informant's tip, probable cause for the warrant must be based upon the observations of the affiant officer.

The central issue on this motion, then, is whether the visit by Trooper Crandall to the defendant's property on July 31, 1981, which the District Attorney concedes was a warrantless search, comes within any exception to the warrant requirement of the Fourth Amendment of the United States Constitution. The State bears the burden of proof on this issue. If no such exception is found, then the search would be unlawful, and thus tainted, and the observations made could not serve to provide probable cause for the warrant.

The evidence indicates that the wooded area where the marijuana was growing, within two fenced and cleared enclosures, was adjacent to an overgrown footpath or so-called tote road in the western part of the defendant's 30 acre, rural property. (See Defendant's Exhibit #12) The enclosures were not visible either from the public road, called the Davis Corner Road and forming part of the defendant's southern boundary, from the defendant's driveway or residence in the eastern part of the property, or from any other point outside the defendant's property, upon neighboring land. The distance from the house, which has an entrance only on the east, or driveway side, to the two enclosures in the west was at least several hundred feet. The perimeter of the Thornton property was posted with a number of signs prohibiting trespassing and hunting. In entering upon the Thornton property on July 31, 1981, the two officers went partly up the driveway from the Davis Corner Road, and then crossed a stone wall in disrepair into the woods, encountering the footpath, which they followed away from the direction of the house to the location where they believed the marijuana to be growing. The testimony of Trooper Crandall and Constable Hartford indicates that they had no license to be on the Thornton property; their intent

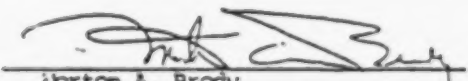
was to corroborate the informant's tip. As is evident from the secluded location chosen for his horticultural enterprise, the defendant had no intent to expose the enclosures to either public or police view. The intent to avoid casual public view, and the efforts taken to generally exclude the public from his wooded property, indicates the defendant had a reasonable expectation of privacy thereon. The officers were not innocently upon any property open to the public (the footpath or tote road was evidently not a public way), or in an area in which ownership of the land was unknown. Neither were the officers lawfully upon any neighboring property when they discovered the marijuana; such a view was impossible from adjacent land. The Court does not find that either the plain view or open fields exception to the warrant requirement is applicable. (The extent to which the open fields doctrine is still viable after Katz v. United States, 389 U.S. 347 (1967) is open to considerable doubt. See, generally W. LaFave, Search & Seizure § 2.4 (1978)). The case of Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974), relied upon by the State, presents a different fact situation. There, the government pollution inspector saw plumes of smoke that were exposed to public view in the adjacent city, and then entered upon a part of the defendant's premises to which the public was not excluded in order to conduct tests.

Accordingly, the Court finds that the warrantless search of July 31, 1981 was an unreasonable and unlawful violation of the defendant's rights and the observations from it cannot provide probable cause for the subsequently issued warrant. Neither can the information obtained in the 1980 search alluded to in the affidavit provide probable cause for the warrant; that information was not only stale in 1981, but may also have been the fruit of an unlawful, warrantless search. The warrant having issued without probable cause, the search and seizure of August 3, 1981 pursuant to it was thus in violation of the defendant's

Fourth Amendment rights.

The motion to suppress is GRANTED. It is hereby ORDERED and DECREED that all articles and items of evidence of every kind and description that were unlawfully seized from the property of the defendant and the defendant's premises at Hartland, Maine, shall not be received or admitted into evidence and no testimony or comment shall be received respecting the same and they are hereby suppressed; all statements and/or admissions both oral and written that may have been made by the defendant as a result of said illegal search and seizure shall not be received or admitted into evidence and no testimony or comment shall be received respecting the same and they are hereby suppressed.

Dated: April 9 , 1982


Morton A. Brody
Justice, Superior Court

AFFIDAVIT AND REQUEST FOR SEARCH WARRANT

I, Carroll E. Crandall, after being duly sworn, depose and say that:

I am a Trooper for the Maine State Police and have been for four and a half years. Your affiant has received formal drug training at the Maine Criminal Justice Academy in February 1975 and the Maine State Police Academy in March of 1977. In this training I received knowledge on the appearance, composition, and effects of marijuana. I have made several seizures of marijuana resulting in arrests and convictions. I have sent samples of marijuana to laboratories for analysis and reports have come back from the chemist to show that in fact the substance that I sent to the chemist was marijuana (Cannibis). I have the ability to accurately identify marijuana in either a growing or dried state.

On information and belief supplied by a reliable, cooperating citizen that on or about the thirty-first day of July, A.D. 1981, in Hartland, County of Somerset and State of Maine, that said citizen did observe marijuana plants growing in several areas penned in by wire mesh in a wooded area behind the residence of Richard Thornton at Davis Corner Road, Hartland, Maine.

That your affiant went to said wooded area on August 3, 1981, and discovered marijuana plants to be growing at the place and position behind the said residence as described by said reliable informant.

That your affiant made said observations by looking through said wire mesh fence (chicken wire).

That your affiant does further describe said wire mesh (chicken wire) as being approximately 2-3 feet high and that your affiant was able to look over and through said wire mesh fence and did observe numerous marijuana plants 3 to 4 ft. high growing in the ground and being cultivated upon said property. Your affiant does estimate that there are between 30 and 40 marijuana plants at said location.

AFFIDAVIT AND REQUEST FOR SEARCH WARRANT


That your affiant requests permission to search for marijuana in the aforementioned wooded area owned by Richard Thornton, more particularly described as a wooded area situated in back of a wood frame house of natural wood color with several outbuildings. The parcel of land is located on the north side of the Davis Corner Road in said Hartland and bordered on the south side by the property of Linwood Leavitt and the property of Gerald Wheeler, bordered on the east side by Henry Parker, bordered on the north side by the property of Roland Reynolds and the property of Steven McNichol, and bordered on the west side by the property of Ellery Ricker.

Your affiant does reasonably believe that probable cause does exist and that the following subject, Richard Thornton, is in violation of Title 17-A Sections 1107 and 1114 of Maine Revised Statutes Annotated.

WHEREFORE, your affiant requests the court to issue a search warrant directing your affiant to conduct a search of the above-described wooded area at Davis Corner Road, Hartland, in the daytime, and that your affiant be further directed to seize and return to the court any marijuana (cannabis) that may be located on said premises.

WHEREFORE, your affiant does further request that he be commanded to search all lands owned or occupied by the said Richard Thornton, excluding buildings and structures designed to exclude human beings. That your affiant did observe approximately one year ago evidence that marijuana was grown on other locations on the property of the said Richard Thornton. That said observation did consist of approximately one year ago your affiant observing approximately 1/4 acre of land that showed evidence that marijuana plants had been previously cultivated and harvested during the Fall of 1980.

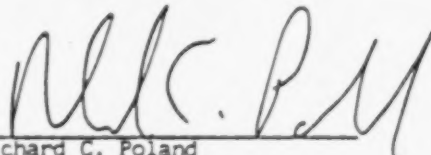
DATED: August 3, 1981


Carroll E. Crandall

STATE OF MAINE

SOMERSET, ss.

Subscribed and sworn to me by the said Carroll E. Crandall,
this third day of August, A.D. 1981, at Skowhegan, County of
Somerset and State of Maine.

A handwritten signature in dark ink, appearing to read "R.C. Poland", written over a horizontal line.

Richard C. Poland
Complaint Justice
12th District Court
Somerset Division
Skowhegan, Maine

AFFIDAVIT AND REQUEST FOR SEARCH WARRANT

I, Carroll E. Crandall, after being duly sworn, depose and say that:

I am a Trooper for the Maine State Police and have been for four and a half years. Your affiant has received formal drug training at the Maine Criminal Justice Academy in February 1975 and the Maine State Police Academy in March of 1977. In this training I received knowledge on the appearance, composition, and effects of marijuana. I have made several seizures of marijuana resulting in arrests and convictions. I have sent samples of marijuana to laboratories for analysis and reports have come back from the chemist to show that in fact the substance that I sent to the chemist was marijuana (Cannibis). I have the ability to accurately identify marijuana in either a growing or dried state.

On information and belief supplied by a reliable, cooperating citizen that on or about the thirty-first day of July, A.D. 1981, in Hartland, County of Somerset and State of Maine, that said citizen did observe marijuana plants growing in several areas penned in by wire mesh in a wooded area behind the residence of Richard Thornton at Davis Corner Road, Hartland, Maine.

That your affiant went to said wooded area on August 3, 1981, and discovered marijuana plants to be growing at the place and position behind the said residence as described by said reliable informant.

That your affiant made said observations by looking through said wire mesh fence (chicken wire).

That your affiant does further describe said wire mesh (chicken wire) as being approximately 2-3 feet high and that your affiant was able to look over and through said wire mesh fence and did observe numerous marijuana plants 3 to 4 ft. high growing in the ground and being cultivated upon said property. Your affiant does estimate that there are between 30 and 40 marijuana plants at said location.

- 2 -

[4]

1 Q For the past four and a half years?
2 A Five and a half years.
3 Q And you were so employed on August 3, 1981?
4 A Yes, I was.
5 Q And did you have an occasion on August 3, 1981, to go
6 to the residence -- well, not the residence -- but to
7 go to the wooded area in Hartland and observe marijuana
8 plants?
9 A Yes, I did.
10 Q Now before going there, can you tell the Court whether
11 or not you had any training with the handling and
12 identification of marijuana?
13 A Yes, I have.
14 Q And can you summarize that briefly?
15 MS. ZEEGERS: Your Honor, I object. This is a
16 Motion to Suppress, and the issue really is whether the
17 officer had a right to go on this property, and not whether
18 he is an expert. We're not calling him an expert in the
19 viewing of marijuana.
20 THE COURT: Mr. Alsop?
21 MR. ALSOP: Your Honor, it seems to me that the
22 issue might come up as to whether or not there is probable
23 cause for the issuance of a warrant, and certainly his
24 ability to identify marijuana would relate to that issue,
25 and once again, I am a little confused as to the particular

-17-

1 MS. ZEEGERS: Your Honor, I object. I think we
2 have to go on the basis of what is in the affidavit and in
3 the warrant. The warrant did not issue on sworn testimony.

4 THE COURT: That objection is overruled. He may
5 answer.

6 A I was contacted by a Harold Hartford, he is the
7 Constable in Hartland. He had just talked with the
8 subject, and the subject said he had been in the
9 wooded area and had seen some marijuana, and wanted to
10 get in touch with him. Officer Hartford and myself
11 talked to the gentleman who indicated that he didn't
12 want to be involved.

13 THE COURT: That he did or he did not?

14 A He did not. He said that he had just been off the
15 Davis Corner Road and had seen some marijuana growing,
16 or what he thought to be marijuana, and the Constable
17 and I went out in back of a mobile home, beside the
18 road.

19 Q Well, before telling us where you went, why don't you
20 go to the board and draw a diagram of the area, telling
21 where you went and the particular area of Hartland.

22 A (The witness leaves the witness stand and goes to the
23 blackboard.) This would be the Davis Corner Road, north
24 would be in this direction here. Mr. Thornton's drive-
25 way goes right in there, and his house is right in here.

1 A (cont'd) There is a mobile home located right in this
2 area, and another house right in this area. It was
3 indicated to us by the informant that the marijuana
4 was growing somewhere in back of the mobile home, and
5 we went onto the property, between the mobile home and
6 the house, and right in here there is a wood road,
7 like that, we walked in from the road and up this
8 woods road, and right in this area there was a chicken
9 wire fence, probably three or four feet high, and
10 probably twelve or fourteen foot square, and there was
11 marijuana growing inside that fence.

12 Q Now let me ask you some questions about that diagram.
13 You indicated that north was on top of the board?

14 A Yes.

15 Q And this horizontal stripe here is the road?

16 A Yes.

17 Q And that's what, the Davis Road?

18 A The Davis Corner Road.

19 Q Why don't you write in the Davis Corner Road right
20 there. Is that area of the Davis Corner Road in
21 Hartland, is that a rural area or a fairly built-up
22 area?

23 A It is a rural area.

24 Q And you have indicated two rectangles lying north of the
25 Davis Corner Road, which I believe you said are residences?

1 A Yes.

2 Q And when was that picture taken?

3 A That would be in the winter, January.

4 Q And approximately how far are the other -- other than
5 the two fenced-in areas we are talking about -- about
6 how far from the border of your property --

7 THE COURT: Which border?

8 MS. ZEEGERS: This border here.

9 THE COURT: Southerly border?

10 MS. ZEEGERS: Yes, southerly border.

11 A Approximately two hundred and fifty feet.

12 Q And approximately how far are those fenced-in areas
13 from the driveway?

14 A Oh, one hundred and fifty or two hundred feet.

15 THE COURT: How far? One hundred and fifty?

16 A Approximately.

17 THE COURT: From which part of the driveway?

18 A Well, where she pointed was toward the end of the
19 driveway.

20 THE COURT: Toward the intersection of the Davis
21 Corner Road end of the driveway?

22 A Yes.

23 THE COURT: And how far do you say it was?

24 A From where the mesh chicken wire is to the back of the
25 property behind the houses was measured at two hundred,

1 A (cont'd) or approximately two hundred and fifty feet.

2 Q So it was a little further than two hundred and fifty
3 feet to the driveway then. I would like to show you
4 what has been marked as Defendant's Exhibits Nos. 10,
5 9, and 11, and ask you if you recognize them?

6 A Yes.

7 Q And would you tell us what each of them are?

8 A The first one is No. 11, is from the Davis Corner Road
9 looking down our driveway, and standing in the road.

10 THE COURT: When you say looking down, do you mean
11 looking in a northerly direction?

12 A Yes. A northerly direction to the house. And No. 10,
13 it is a little farther down the driveway, looking north.
14 And the third one, No. 9, is the house itself.

15 THE COURT: And that's looking from the driveway
16 in a northerly direction toward the house?

17 A Yes.

18 Q How far from your driveway is the No Trespassing sign?

19 A To the first one? I would say maybe thirty feet or
20 twenty feet, I'm not exactly sure. It is close to the
21 driveway.

22 Q And you say twenty or thirty feet from the driveway?

23 A Yes, to the right of the driveway.

24 Q Mrs. Thornton, what is the approximate total amount of
25 cleared land that you have in the driveway on your

1 Q (cont'd) property, excluding the buildings and
2 foundation?

3 A The only other areas are the garden and the two fenced-
4 in areas.

5 Q And do you know approximately how big that would be?

6 A The garden is twenty-eight, sixty-two, approximately,
7 and the other small ones are six by six and nineteen
8 by six and a half.

9 Q Are there any footpaths that go from those two fenced-
10 in areas to your house?

11 A Well, yes, indirectly.

12 Q Have you or your husband ever allowed anyone to routinely
13 walk through your property to get to anyone else's
14 property, or to the road?

15 A No.

16 Q And you have not allowed hunters on your property?

17 A No.

18 Q And you have not allowed other trespassers on your
19 property?

20 MR. ALSOP: Your Honor, I object. That is leading.

21 THE COURT: Sustained.

22 Q Now these footpaths that you have referred to coming
23 from this area on the north side of your property, from
24 the boundary of your property getting to these two
25 fenced-in areas, would you be able to get through there?

THE COURT: The objection is sustained.

1
2 Q Have you been out to these plots?

3 A Yes, I have.

4 Q And more than once during the course of the summer of
5 1981?

6 A Yes.

7 Q And were you aware of what was growing out there?

8 A Yes.

9 Q Is that in fact why they were growing out in that area?

10 A Yes.

11 Q Is it fair to say that you or your husband did not want
12 it to be viewed from the road; is that true?

13 A True.

14 Q In fact, they were out in a well-wooded area?

15 A That's true.

16 Q And the fence around them was to keep out the animals?

17 A Anything that would bother it, not necessarily animals.

18 THE COURT: Police and things like that?

19 Q Was it possible to see through the fence?

20 A If you looked through the fence, yes.

21 Q How do you get inside of those fences?

22 A Pull the wire down.

23 Q So there was no gate on it or anything of that sort?

24 A No. You would have to search to find your way in.

25 Q This so-called tote road, or footpath, is quite grown

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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES


No. 82-1273

STATE OF MAINE,)
)
 Petitioner,)
)
 v.)
)
 RICHARD THORNTON,)
)
 Respondent.)

MOTION FOR LEAVE
TO PROCEED IN
FORMA PAUPERIS

NOW COMES the Respondent Richard Thornton and by and through his attorney requests that this Court allow him to defend the above action in forma pauperis as Respondent is unable to pay for costs in defending the above appeal. Proof of poverty is hereinafter set forth in the attached affidavit which shall be incorporated by reference into this Motion.

Submitted by:



Donna L. Zeegers, Esq.
Attorney for Respondent

DOYLE & NELSON
P. O. Box 2709
Augusta, Maine 04330

Dated: March 9, 1983

ORIGINAL

SUPREME COURT OF THE UNITED STATES

RECEIVED

MAR 11 1983

Office of the Clerk
SUPREME COURT OF THE UNITED STATES

No. 82-1273

STATE OF MAINE,)
)
 Petitioner,)
)
 V.)
)
 RICHARD THORNTON,)
)
 Respondent.)

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE
TO PROCEED IN
FORMA PAUPERIS

I, Richard Thornton, being first duly sworn, on oath depose and say:

1. That I am the Respondent in the above-entitled case;
2. That in support of my motion to defend an appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to defend myself against the issue which the State of Maine has presented for appeal;
3. I further swear that the information below relating to my ability to pay the costs of defending the appeal are true:
 - a. I am currently unemployed and have been unemployed since November, 1982. Prior to my unemployment, I received approximately \$1140 per month; however, for the last two winters, I have been unemployed;
 - b. I currently receive unemployment compensation of \$129 per week, and interest from my savings account is approximately \$12 for the last twelve months;
 - c. My savings account totals \$110.00; I have no checking or other accounts;

d. My only real estate is my two-room house which has no plumbing and the surrounding 38 acres of land, more or less; the total value of this real estate is under \$10,000.00;

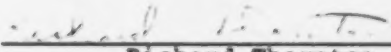
e. I own a 1975 Dodge Dart worth approximately Five Hundred (\$500) Dollars;

f. The persons dependent on me for support are my wife, Linda Thornton, and my children, Dylan Thornton and Kaili Welch, who all live with me.

4. I hereby certify that I cannot because of my poverty pay for the defense of the above appeal and still be able to provide myself and my dependents with the necessities of life.

5. I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Dated: March 9, 1983



Richard Thornton

STATE OF MAINE
Kennebec, ss.

March 9, 1983

Personally appeared the above-named Richard Thornton and made oath that the statements made and subscribed by him in the above Affidavit are true.

Before me,


Notary Public

MY COMMISSION EXPIRES
JUNE 10, 1987

MAY 26 1983

ALEXANDER L. STEVAS,
~~CLERK~~

No. 82-1273

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF MAINE,
Petitioner

V.

RICHARD THORNTON,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR PETITIONER

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Attorney General

JAMES W. BRANNIGAN, JR.
Deputy Attorney General

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QUESTION PRESENTED

Whether the Maine Supreme Judicial Court correctly construed the Fourth Amendment by holding that the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), was inapplicable to the instant case - wherein police officers warrantlessly entered a heavily wooded area of Mr. Thornton's 38-acre rural property - just because No Trespassing and No Hunting signs, an old stone wall, and an old barbed wire fence dot the perimeter of Mr. Thornton's property and because Mr. Thornton chose a secluded location in his woods to cultivate his marijuana.

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QUESTION PRESENTED

Whether the Maine Supreme Judicial Court correctly construed the Fourth Amendment by holding that the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), was inapplicable to the instant case - wherein police officers warrantlessly entered a heavily wooded area of Mr. Thornton's 38-acre rural property - just because No Trespassing and No Hunting signs, an old stone wall, and an old barbed wire fence dot the perimeter of Mr. Thornton's property and because Mr. Thornton chose a secluded location in his woods to cultivate his marijuana.

OPINIONS BELOW

The citation to the opinion of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton is State v. Thornton, 453 A.2d 489 (Me. 1982). This opinion is also reproduced in the appendix of the State of Maine's printed Petition for a Writ of Certiorari at pages A1 to A26.

The Maine Superior Court suppression order is reproduced in the appendix of the printed petition at pages B1 to B8.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

The opinion and judgment of the Supreme Judicial Court of Maine in State v. Thornton, 453 A.2d 489 (Me. 1982), was entered on December 6, 1982, and the

Court's mandate issued on the same day. The State of Maine's Petition for a Writ of Certiorari was timely filed on January 31, 1983, within the sixty-day filing period set forth in U.S.Sup.Ct. Rule 20.1.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the basis of an informant's tip that marijuana was growing in a heavily wooded area behind a mobile home on the Davis Corner Road in Hartland, Maine (J.A. 27-28, 73-74), Maine State Trooper Crandall and Hartland Constable Hartford drove to the mobile home on the morning of August 3, 1981. (J.A. 45). They parked their automobile in front of the mobile home (J.A. 36), and walked between the mobile home¹ and a house occupied by one Leavitt to the heavily wooded area immediately behind the two residences. (J.A. 28, 32-33, 58, 64-65, 73-74 (Trooper

¹ The names of the occupants are not in the record, but the mobile home was occupied by an elderly couple and not the Respondent. (J.A. 30-31).

Crandall); 121-22 (Constable Hartford)). They then followed a footpath, crossing a broken down stone wall,² into the heavily wooded area until they came across a clearing where marijuana plants were growing in two patches. (J.A. 29, 33-34, 38, 58, 73-74 (Trooper Crandall); 86, 91-92 (Linda Thornton); 121-22 (Constable Hartford); State v. Thornton, 453 A.2d at 492; Pet. App. A10). Each patch was enclosed by chicken-wire fencing, over and through which the marijuana plants were visible. (J.A. 29, 48 (Crandall); 94-98, 114 (Linda Thornton); see also J.A. 7). Trooper Crandall suspected that the marijuana patches

² Respondent Thornton's wife testified that in addition to the old stone wall there were a few No Trespassing-No Hunting signs also on the perimeter of the Thornton property, but the officers did not see them. (J.A. 90-93 (Linda Thornton); 36-37, 80 (Crandall); 122 (Hartford)).

were on property owned by Respondent Richard Thornton ("Thornton"). (J.A. 37-38). However, the patches were some 500 feet from the Thornton house and because of the density of the woods were not visible from the house, the adjoining driveway, the public road or any neighboring property. (J.A. 34-36, 47, 72 (Crandall); 84-89, 95, 113, 115 (Linda Thornton)).

Upon observing the marijuana patches, the officers retraced their route back to their automobile. (J.A. 62, 65).

Thereafter Trooper Crandall went directly to the town office in Hartland where he was able to confirm that the marijuana patches indeed were located on Thornton's property. (J.A. 39-40). After securing a search warrant for which the probable cause was established at least in part by the

officers' warrantless observation of the marijuana plants on Thornton's land, Trooper Crandall along with several other law enforcement officers returned to the woods that same day, August 3rd,³ and seized the plants (J.A. 102-05, 36, 65, 69, 76-77; R. 1).

On August 11, 1981, Respondent Thornton was charged by complaint with unlawfully furnishing Schedule Z drugs in violation of 17-A Maine Revised Statutes Annotated (M.R.S.A.) § 1106. (J.A. 14-15). Prior to

³ Both the Maine Superior Court and Supreme Judicial Court erred in stating that the officers' warrantless entry into Thornton's woods occurred on July 31, 1981. (Pet. App. B2, B4 (Superior Court); Thornton, 453 A.2d at 491-92; Pet. App. A2-A5). The informant spotted the marijuana patches on July 31, 1981 (J.A. 6), but the officers' warrantless visit occurred in fact on August 3, 1981 - the same day that Trooper Crandall applied for, received, and executed the search warrant. See J.A. 6, 9 (Affidavit and Request for Search Warrant); 26, 40, 102-07 (suppression hearing transcript).

trial, a Maine Superior Court Justice granted Thornton's motion to suppress for use as evidence the seized marijuana and the police officers' observations thereof because the officers had not obtained a search warrant before their initial entry onto Thornton's property on August 3rd.⁴ (Pet. App. B3-B8).

On appeal to the Supreme Judicial Court of Maine, Petitioner contended that the viability of the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), has not been diminished by Katz v. United States, 389 U.S. 347 (1967), and that Hester's "open fields" doctrine

⁴ Both at the outset of the suppression hearing and in closing argument the State's Attorney consistently maintained that under the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), the protections of the Fourth Amendment did not apply to Respondent's woods. (J.A. 24-24A, 123-24, 134-36).

permitted the August 3rd warrantless entry into the wooded area beyond the curtilage of Thornton's house, because Thornton lacked a reasonable expectation of privacy in his woods. Although acknowledging Hester's continuing viability, the Maine Supreme Judicial Court affirmed the suppression order on the ground that Fourth Amendment protections applied to Respondent's woods surrounding his marijuana patches and that the officers' August 3rd warrantless entry into the woods did not fit within any of the exceptions to the Fourth Amendment's warrant requirement. State v. Thornton, 453 A.2d 489, 493-96 (Me. 1982); Pet. App. A11-A26.

SUMMARY OF ARGUMENT

In context of the modern framework for determining the Fourth Amendment's

applicability under Katz v. United States, 389 U.S. 347 (1967), the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), should be a bright-line rule that any subjective expectation of privacy in an open field or wooded area - even one that is fenced, posted, and secluded - is unreasonable per se. Pursuant to this "bright-line," Hester's "open fields" doctrine should be applied to the instant case.

A. This Court has referred to Hester approvingly in both Katz and its progeny but has not yet defined the scope of the "open fields" doctrine in terms of Katz's "reasonable expectation of privacy" test. Pursuant to Katz, there are several reasons why Fourth Amendment protections should not extend to open fields or wooded areas, even those that are fenced, posted, and secluded.

First, by ruling in Katz that the Fourth Amendment's reach cannot turn upon the presence or absence of a physical trespass, this Court reaffirmed the Hester holding that Fourth Amendment protections do not become applicable simply because an officer commits an intentional trespass onto fenced land. Hence, under Katz, any subjective expectation of privacy manifested by fences and No Trespassing signs does not become reasonable for Fourth Amendment purposes simply because an officer must thereby commit an intentional trespass to enter the property.

Second, unlike Katz's enclosed telephone booth, open fields and wooded areas - even those that are fenced and posted - are not the types of places where human relations or activities creating the need for privacy ordinarily take place. Any

subjective expectation of privacy in fields or woods is therefore objectively unreasonable and not entitled to Fourth Amendment protection. Hester is in accord, holding that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." Hester, 265 U.S. at 59. It makes no difference that an activity or object concealed in the fields or woods might be hidden from public view because fields and woods are still outside the realm of human expectations of privacy.

The conclusion that any subjective expectation of privacy in open fields or wooded areas is unreasonable per se is bolstered by the realities of modern-day surveillance. No person conducting an activity outdoors on or above the surface

of the ground, no matter how secluded the outdoor area, can have any reasonable expectation that his activity will remain free from aerial observation. Yet, aerial observation, particularly of fenced, posted, and secluded areas, has consistently been held not to invade an expectation of privacy protected by the Fourth Amendment.

Third, the inconsistency on very similar sets of facts between the Sixth Circuit's decision in United States v. Oliver, 686 F.2d 356 (1982), and the Maine Supreme Judicial Court's decision in State v. Thornton, 453 A.2d 489 (Me. 1982), illustrates the need for a "bright line" concerning the applicability of Hester's "open fields" doctrine in the wake of Katz. Drawing the "bright line" to exclude any subjective expectation of privacy in

fields or woods - even those that are fenced, posted, and secluded - from being objectively reasonable not only is consistent with this Court's decisions in Hester and Katz but also gives clear guidance to courts, police, and individual citizens concerning the scope of Hester's "open fields" doctrine in the wake of Katz.

B. The foregoing analysis discredits the two prerequisites which the Maine Supreme Judicial Court set for the applicability of the "open fields" doctrine - that (1) the officers be lawfully on Respondent's land and (2) Thornton's cultivation of marijuana be conducted openly. Applying Hester's "open fields" doctrine as a bright-line rule to the facts in this case can only result in the conclusion that Thornton's subjective expectation of privacy in his fenced and posted woods

was unreasonable and that the officers' observations of his marijuana patches were outside the scope of his Fourth Amendment protection.

ARGUMENT

- I. THE "OPEN FIELDS" DOCTRINE OF HESTER V. UNITED STATES, 265 U.S. 57 (1924), IS DIRECTLY APPLICABLE TO THE INSTANT CASE.

In State v. Thornton, 453 A.2d 489 (Me. 1982), the Maine Supreme Judicial Court held that Respondent Thornton had a reasonable expectation of privacy in his rural woods surrounding his marijuana patches and was therefore entitled to Fourth Amendment protection there pursuant to Katz v. United States, 389 U.S. 347 (1967). The Maine Court reasoned that Thornton had a subjective expectation of privacy as evidenced by

the posting of his property, his choice of a secluded location for his marijuana patches which were observable only from his land, and Thornton's practice of excluding trespassers (Thornton, 453 A.2d at 494; Pet. App. A18), and asserted without further explanation that this subjective expectation of privacy was objectively reasonable (453 A.2d at 495, 496; Pet. App. A19, A25).

Although the Maine Court found that the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), "remains entirely intact" after Katz, it nevertheless concluded that Hester did not apply to the officers' warrantless entry into Thornton's woods. The reason was that the two prerequisites which the Court set for the applicability of the "open fields" doctrine,

viz., that the activity be openly conducted and the police be legally at their vantage point,⁵ had not been met here.

5 The Maine Court prefaced these two prerequisites with the statement that "[i]n Maine, for the 'open fields' doctrine to apply, two factual aspects of the circumstances must be considered..." (Thornton, 453 A.2d at 495; Pet. App. A21), suggesting the possibility that the Maine Court was interpreting a Maine version of the "open fields" doctrine pursuant to state constitutional law wholly independent of the federal Fourth Amendment. However, as authority for its two "Maine" prerequisites for the applicability of the "open fields" doctrine, the Maine Court cited State v. Peakes, 440 A.2d 350 (Me. 1982), State v. Dow, 392 A.2d 532 (Me. 1978), and State v. Stone, 294 A.2d 683 (Me. 1972). All three of these cases - Peakes, Dow, and Stone - involve the scope of federal Fourth Amendment protection, especially in the wake of Katz v. United States, 389 U.S. 347 (1967), and do not cite or purport to interpret in any way the state constitutional provision on search and seizure (Me. Const. art. I, section 5). Moreover, the Thornton decision itself, like Peakes, Dow, and Stone, is concerned with the scope of federal Fourth Amendment protection under Katz and does not cite or discuss the state constitution. Hence, there is no foundation for a claim that the Maine Supreme Judicial Court's decision in

Thornton, 453 A.2d at 495-96; Pet. App. A20-A26.

Petitioner agrees with the Maine Court that Hester is still good law.⁶ However, Petitioner contends that in the context of modern Fourth Amendment analysis Hester should stand for the proposition that any subjective expectation of privacy in an open field or wooded area - even one that is fenced, posted, and secluded - is per se unreasonable and, therefore, that the Maine Court's two prerequisites for applying the "open fields" doctrine are inappropriate. In light of Katz there are good reasons for viewing Hester as setting

⁵ cont. Thornton is based on an adequate state ground independent of the federal question presented for review in this case. See Texas v. Brown, 51 U.S.L.W. 4361, 4362 n.1 (U.S. Apr. 19, 1983).

⁶ See infra p.20, n. 7 and accompanying text.

forth such a per se rule. Pursuant to this "bright Line," Hester's "open fields" doctrine should be applied to the instant case.

- A. In terms of Katz, Hester represents a per se rule that any subjective expectation of privacy in open fields or wooded areas is unreasonable.

In Katz v. United States, 389 U.S. 347 (1967), this Court articulated the standard for determining the applicability of Fourth Amendment protections, namely, whether government action has invaded an expectation of privacy upon which a person justifiably relied. Katz, 389 U.S. at 353. Pursuant to Katz, the Supreme Court in subsequent decisions "uniformly has held that the application of the Fourth amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reason-

able,' or a 'legitimate expectation of privacy' that has been invaded by a government action." Smith v. Maryland, 442 U.S. 735, 740 (1979) (citations omitted), quoted in United States v. Knotts, 103 S.Ct. 1081, 1085 (1983). As articulated by Justice Harlan in his Katz concurrence, application of this standard involves a two-fold inquiry: (1) whether a person has "exhibited an actual (subjective) expectation of privacy," and (2) whether that expectation is "one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring). A majority of this Court has since adopted Justice Harlan's formula for applying the Katz standard. See Smith v. Maryland, 442 U.S. 735, 740 (1979), quoted in United States v. Knotts, 103 S.Ct. 1081, 1085 (1983).

While this Court has referred approvingly to Hester v. United States, 265 U.S. 57 (1924), in Katz and its progeny,⁷ the Court has not yet squarely addressed the scope of Hester's "open fields" doctrine in terms of Katz's "reasonable expectation of privacy" test. In asking this Court to integrate Hester with Katz, Petitioner contends that the Hester decision is consistent with and fully justified by modern Fourth Amendment analysis and represents a per se rule that any subjective expectation of privacy in an open field or wooded area - even one that is fenced,

⁷ See United States v. Knotts, 103 S.Ct. 1081, 1086, 1087 (1983); Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 (1977); United States v. Santana, 427 U.S. 38, 42 (1976); Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865-66 (1974); Cady v. Dombrowski, 413 U.S. 433, 450 (1973); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 393 n.6 (1971).

posted, and concealed from the public - is objectively unreasonable for purposes of Fourth Amendment protection.

The facts on which the Hester decision was based provide the starting point for analysis. There, Gosnell and King, two federal revenue officers, while driving by the Hester house on information that illicitly distilled whiskey was on the premises, noticed a car stop in the public road in front of the house and a boy named Henderson get out of the car and go to the house while his mother stayed in the car. The officers drove past the Henderson car to a turn in the road, where, once out of view, Gosnell got out of the officers' car and entered the pine trees beside the road. (Transcript of Record at 15, 21,

Hester v. United States, 265 U.S. 57 (1924)).⁸ Approaching the Hester house through the woods, Gosnell climbed over a fence and entered a pasture. (Transcript of Record at 16, 19, 20). The fence put Gosnell on notice that he may have been coming onto Hester's father's land and thereby committing a trespass. (Transcript of Record at 19).

Just after crossing the fence, at a distance of approximately 50 to 75 or 100 yards from the Hester house, Gosnell observed Charlie Hester hand a bottle of what appeared to be illicitly distilled whiskey to Henderson. (Transcript of Record at 16,

⁸ The "Transcript of Record" in the Hester case, filed March 9, 1923, was apparently the equivalent then to what is now the Joint Appendix under U.S.Sup.Ct. Rule 30.

19, 20). Henderson's mother then gave an alarm, causing Hester and Henderson to flee with Gosnell in pursuit. (Transcript of Record at 16-17). About 200 yards from the Hester house, Hester and Henderson discarded the whiskey jug and bottle they had been carrying. Gosnell examined each and determined that both the jug and bottle contained illicitly distilled whiskey. (Transcript of Record at 17-18). Gosnell thought these examinations took place on Hester land. (Transcript of Record at 20). Meanwhile, Gosnell's companion, Officer King, discovered by the side of the Hester house a recently broken jar that also contained illicitly distilled whiskey. (Transcript of Record at 21-22).

Hester contended that the officers' warrantless entry onto his father's land and subsequent observations, pursuit, and

examination of the jug, bottle, and jar constituted a trespass and therefore an illegal search and seizure under the Fourth Amendment. Rejecting his argument, this Court stated:

It is obvious that, even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned.... The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons,

houses, papers, and effects" is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Com. 223, 225, 226.

Hester, 265 U.S. at 58-59. Hence, Hester stands for the proposition that a police officer's knowing and intentional trespass onto fenced property outside the home⁹ falls outside the scope of the Fourth Amendment.¹⁰

⁹ For the last half-century - since Olmstead v. United States, 277 U.S. 438, 466 (1928) - Hester's "open fields" doctrine has meant that the open area beyond the "curtilage" of a house is not subject to Fourth Amendment protection. See, e.g., United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977); Care v. United States, 231 F.2d 22 (10th Cir. 1956); Skipper v. State, 387 So.2d 261 (Ala. App. 1980).

¹⁰ Significantly, Hester handed the bottle to Henderson after the officers' car passed by the Hester house and out of sight so that Hester had a subjective expectation that the transaction would not be observed by the officers from the public road. Hester, like Thornton in the instant case,

The Court's decision in Katz, while reformulating the analytical framework under which Hester and other cases concerning the applicability of the Fourth Amendment were decided, did not eviscerate Hester's "open fields" doctrine. On the contrary, Hester's "open fields" doctrine, including its application to fields or wooded areas that are fenced, posted, and secluded, is logically compelled by the reasoning in Katz. There are two reasons why this is so.

First, in Katz this Court reaffirmed the Hester holding that the interest protected by the Fourth Amendment is not

10 cont. also had a subjective expectation of privacy that the officers would not commit an illegal trespass onto his father's land to gain a different vantage point. In terms of Katz's modern framework for determining the Fourth Amendment's applicability, the Hester Court in effect found this latter subjective expectation of privacy to be unreasonable.

equivalent to the property interest protected by local trespass laws. The Court stated that "the Fourth Amendment protects people, not places." Katz, 389 U.S. at 351. Indeed, overruling the holding in Olmstead v. United States, 277 U.S. 438 (1928), that the Fourth Amendment could not be violated in the absence of a physical trespass, this Court stated that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Katz, 389 U.S. at 353. Subsequent decisions of this Court have been consistent in adhering to this principle. See United States v. Knotts, 103 S.Ct. 1081, 1087 (1983) ("Just as notions of physical trespass based on the law of real property were not dispositive in Katz, supra, neither were they dispositive in Hester v. United States, 265 U.S. 57

(1924)."); Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978); United States v. Santana, 427 U.S. 38, 42 (1976); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 393 n.6 (1971) ("[W]e have in some instances rejected Fourth Amendment claims despite facts demonstrating that federal agents were acting in violation of local [property] law. ... Hester v. United States, 265 U.S. 57 (1924) ('open fields' doctrine)"); Id. at 393-94 ("[O]ur recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws. Katz v. United States, 389 U.S. 347 (1967)...."); Id. at 394 ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by

the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."). In view of Hester and also Katz and its progeny, the Maine Supreme Judicial Court was clearly wrong in making "the lawfulness of the officers' presence" (Thornton, 453 A.2d at 495; Pet. App. A21) a prerequisite to the application of the "open fields" doctrine.

Because the intentional nature of the trespass does not create Fourth Amendment rights, it makes no difference under either Hester or Katz that the land on which an officer intentionally trespasses is fenced and posted. The purpose of posting a field or woods is to put an individual on notice that he is about to trespass onto private property against the owner's will, and the purpose of placing a fence around the

perimeter of a field or wooded area is to give the same kind of notice, to mark a property boundary line, to keep farm animals within the property or wild animals without, or to discourage people from entering the property. In view of the notice provided by No Trespassing signs and fences, a police officer who enters onto fenced and posted property commits an intentional trespass. However, by ruling in Katz that the Fourth Amendment's reach cannot turn upon the presence or absence of a physical trespass, this Court reaffirmed the Hester holding that Fourth Amendment protections do not become applicable simply because an officer commits an intentional trespass. Thus, in terms of Katz, Hester means that any subjective expectation of privacy manifested by fences and No Trespassing signs does not become reasonable

for Fourth Amendment purposes simply because an officer must thereby commit an intentional trespass to enter the property.

This point is supported by the facts in Hester itself. Hester's father's land was fenced. In fact it was the fence which put Officer Gosnell on notice that upon entering the pasture he may have been coming onto Hester land (Transcript of Record at 19, Hester), and it was only after climbing over the fence and thereby committing an intentional trespass that Gosnell observed Hester hand the bottle of whiskey to Henderson (Transcript of Record at 16, 19, 20, Hester). Yet, this Court found no Fourth Amendment violations.

A second reason why Hester's "open fields" doctrine is logically compelled by Katz concerns the relationship of an open

field or wooded area to human activity. Unlike Katz's enclosed telephone booth, open fields and wooded areas are not places where human relations or activities creating the need for privacy ordinarily take place. See United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982) (en banc). This much is suggested by the majority opinion in Katz which accepted and noted what appeared to be common ground between the parties in that case that, on the basis of Hester, an open field is outside the reach of the Fourth Amendment. Katz, 389 U.S. at 351 n.8. Moreover, Justice Harlan in his concurring opinion, which has become the formula by which Katz is applied,¹¹ indicated that any subjective expectation

¹¹ See supra p. 19 .

of privacy in an open field is unreasonable
per se, stating:

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U.S. 383 (1914), and unlike a field, Hester v. United States, 265 U.S. 57 (1924), a person has a constitutionally protected reasonable expectation of privacy....

389 U.S. at 360 (Harlan, J., concurring).

Justice Harlan additionally stated:

Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances

would be unreasonable.
Cf. Hester v. United
States, supra.

389 U.S. at 361 (Harlan, J., concurring).
Fencing and posting a field or wooded area
merely manifest a subjective expectation of
privacy and do not change the basic premise
that a field or wooded area is not a place
where human communications, relationships,
and activities demanding privacy occur. To
expect such privacy there is unreasonable.
Decisions of both federal and state courts
since Katz have so held. See United States
v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en
banc) (Hester viable in the wake of Katz;
"open fields" doctrine applied to fenced
and posted fields); United States v.
Williams, 581 F.2d 451 (5th Cir. 1978)
(Hester cited as still being good law even
though Katz "has done away with outmoded
property concepts"; "open fields" doctrine

applied where agents stepped over "dilapidated hogpen fence" on their way to a shed); United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977) (Hester viable; fenced goosehouse 400 feet from house was outside curtilage; 14.5-acre portion of 20-acre farm, "all of which was surrounded by a fence," was "clearly open fields"); Ford v. State, 264 Ark. 141, 569 S.W.2d 105 (1978), cert. denied, 441 U.S. 947 (1979) ("open fields" doctrine viable and applied to field which was fenced, posted, and had a locked gate); Giddens v. State, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026 (1981) (Hester viable in the wake of Katz; "open fields" doctrine applied to field surrounded by barbed wire fence; "We do not believe that any expectation of privacy

defendant had in regard to this field was reasonable under these circumstances." (156 Ga. App. at 259, 274 S.E.2d at 597)); State v. Cemper, 209 Neb. 376, 307 N.W.2d 820 (1981) ("straight-forward application of Hester and the open fields doctrine was still proper" in the wake of Katz (209 Neb. at 380, 307 N.W.2d at 822)); "open fields" doctrine applied to cornfield enclosed by a barbed wire fence and entered through an open gate; defendant had no legitimate expectation of privacy); Commonwealth v. Janek, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976) (Hester not overruled by Katz; "open fields" doctrine applied to field posted at regular intervals and surrounded by barbed wire fences and high banks).

The framers recognized that open fields and wooded areas are generally outside the realm of human expectations of privacy by

expressly limiting the Fourth Amendment's protection against unreasonable searches and seizures to persons, houses, papers, and effects. The Hester decision is in accord, holding that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." Hester, 265 U.S. at 59. By conditioning the Fourth Amendment's applicability upon objectively reasonable expectations of privacy, Katz perpetuates Hester's "open fields" doctrine as a per se rule that any subjective expectations of privacy in an open field or wooded area are, as a matter of law, unreasonable. See United States v. Knotts, 103 S.Ct. 1081, 1085-86 (1983) ("[N]o such [traditional] expectation of privacy extended... to movements of objects such as the drum of

chloroform outside the cabin in the 'open fields.' Hester v. United States, 265 U.S. 57 (1924)"). Under this rule, Thornton's subjective expectation of privacy manifested by the fencing and posting of his wooded area is no more reasonable for purposes of Fourth Amendment protection than was Charlie Hester's subjective expectation of privacy inherent in his father's property interest in his father's fenced land.¹²

Since there can be no reasonable expectation of privacy in open fields or

¹² It is immaterial that Respondent cultivated the marijuana in his rural woods rather than in "open fields." Bedell v. State, 257 Ark. 895, 521 S.W.2d 200, 201 (1975); Cornman v. State, 156 Ind. App. 112, 294 N.E.2d 812, 816-17 (1973); see also United States v. Hare, 589 F.2d 242, 243 (5th Cir. 1979); Sesson v. State, 563 S.W.2d 799 (Tenn. 1978). Woods as well as fields are not a setting for lawful human activities demanding privacy, and there can therefore be no objectively reasonable expectation of privacy in either place.

wooded areas, it makes no difference for Fourth Amendment purposes that an activity or object concealed in the fields or woods might be hidden from public view. The Fourth Amendment is still inapplicable. This point was articulated by the Wisconsin Supreme Court in Conrad v. State, 63 Wis.2d 616, 218 N.W.2d 252 (1974), as follows:

Under the "open fields" doctrine, the fact that evidence is concealed or hidden is immaterial. The area [the open field] is simply not within the protection of the Fourth Amendment. If the field where the body was found does not have constitutional protection, the fact that the sheriff, rather than observing the evidence that might have been in plain view, dug into the earth to find the body and committed a trespass in so doing does not confer protection.

63 Wis.2d at 625, 218 N.W.2d at 257. See also United States v. Brown, 473 F.2d 952 (5th Cir. 1973) (Hester's "open fields" doctrine applied where F.B.I. agents found suitcase only by digging two to three inches below the ground surface of farmland adjacent to a chicken coop); People v. Lashmett, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979), cert. denied, 444 U.S. 1081 (1980) (Hester's "open fields" doctrine applied even though tractor, located about 100 to 125 yards from dwelling house, could not be seen plainly from adjacent public ways and sheriff had to climb over two fences to get to the tractor to determine its serial number); State v. Cemper, 209 Neb. 376, 307 N.W.2d 820 (1981) (Hester's "open fields" doctrine applied even though growing marijuana was not visible from the borders of the property, from the buildings

on the property, nor from any location outside the cornfield due to the height of the growing corn). Hence, the Maine Supreme Judicial Court's statement in Thornton that the other prerequisite for applying Hester's "open fields" doctrine is "the openness with which the activity is pursued" (Thornton, 453 A.2d at 495; Pet. App. A21) likewise is wrong.

The conclusion that any subjective expectation of privacy in open fields or wooded areas is unreasonable per se is bolstered by the realities of modern-day surveillance. No person conducting an activity outdoors on or above the surface of the ground, no matter how secluded the outdoor area, can have any reasonable expectation that his activity will be protected from aerial observation. Yet, aerial observation, particularly of fenced,

posted, and secluded areas, has consistently been held not to invade an expectation of privacy protected by the Fourth Amendment. E.g., United States v. Allen, 633 F.2d 1282, 1289-90 (9th Cir. 1980) (aerial observation of posted ranch with gate across main access road), cert. denied, 454 U.S. 833 (1981); United States v. Mullinex, 508 F. Supp. 512 (E.D. Ky. 1980) (aerial observation of a posted farm with limited physical access); United States v. DeBacker, 493 F. Supp. 1078 (W.D. Mich. 1980) (aerial observation of fields within fenced and posted farm); People v. Superior Court, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974) (aerial observation of fenced backyard behind a home); Dean v. Superior Court, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973) (aerial observation of field surrounded by forest); State v.

Stachler, 58 Hawaii 412, 570 P.2d 1323 (1977) (aerial observation of small marijuana patch located 15 feet from house in isolated area accessible only by passing through locked gate and over unimproved road); People v. Lashmett, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979) (aerial observation of fenced farmyard), cert. denied, 444 U.S. 1081 (1980); State v. Davis, 51 Or. App. 827, 627 P.2d 492 (1981) (aerial observation of posted property with locked gate across driveway in secluded, wooded area); see also United States v. Knotts, 103 S.Ct. 1081, 1086 (1983) ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case"). But see People v. Sneed, 32 Cal. App. 3d 535, 108 Cal.

Rptr. 146 (1973) (helicopter hovering 20 to 30 feet above backyard of house was unreasonable governmental intrusion).

The conclusion that any expectation of privacy in open fields or woods is unreasonable per se puts into perspective Petitioner's initial contention that trespass by police officers is immaterial to application of Fourth Amendment protections. For if a person has a subjective expectation of privacy it is reasonable or unreasonable before the police ever arrive on the scene, and the subsequent actions of the police officers, including an intentional trespass, cannot convert an objectively unreasonable expectation of privacy into one that is reasonable. This Court made precisely this point in the recent case of United States v. Knotts, 103 S.Ct.

1081, 1086, 1087 (1983), where, citing Hester, it held that an unreasonable expectation of privacy for travel visible from public places was not rendered reasonable by a trespassing beeper disclosing the same activity. Likewise, an unreasonable expectation of privacy for activity in open fields or woods, which is visible from the air, is not rendered reasonable by the intentional trespass of an officer who discovers that activity.

A third reason for giving full effect to Hester's "open fields" doctrine in the wake of Katz is the advantage of having a "bright line." This Court recently has drawn several "bright lines" in the law of search and seizure in order to give specific guidance to courts, police, and individual citizens concerning the scope of Fourth Amendment protections. United

States v. Ross, 102 S.Ct. 2157 (1982) (pursuant to automobile exception to warrant requirement, police can open and search any container in the vehicle that might contain the sought-after item); New York v. Belton, 453 U.S. 454 (1981) (a search incident to arrest of an occupant of a vehicle can extend through the entire passenger compartment of the vehicle, including any locked or unlocked containers). A bright-line rule concerning the applicability of Hester in light of Katz will spare courts and the police the difficult task of making case-by-case determinations on recurring fact situations where, in the absence of such a bright line, there has been and undoubtedly will continue to be great inconsistency among the decisions. Both cases now before this Court, the instant one and the Oliver case,

underscore the problem - nearly identical facts but different results.

Correspondingly, law enforcement officers can hardly perform their duties, often done in rapidly developing circumstances, when the lawfulness of their observations may vary with the presence and quality of fencing on a property, the presence, number, and location of No Trespassing signs on the property, the existence of a practice of excluding trespassers, and the availability and nature of state laws governing posting and trespass. As noted by the Sixth Circuit in Oliver, such case-by-case determinations could lead to the incongruous result that the applicability of Fourth Amendment protection might well depend on the direction from which the police accomplish their search. For example, the Fourth Amendment could

apply if the police pass No Trespassing signs and a locked gate in making their search. If, however, they make the search by helicopter, or on the ground but from another direction where there are no signs and an open gate, there may be found no reasonable expectation of privacy and therefore no Fourth Amendment protections. See United States v. Oliver, 686 F.2d at 360 n.4.

In New York v. Belton, 453 U.S. 454 (1981), this Court stated, "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." 453 U.S. at 459-60. The bright-line rule here advocated, viz., that any subjective expectation of privacy in

fields or woods - even those that are fenced, posted, and secluded - is unreasonable per se, gives clear guidance to courts, police, and individual citizens concerning the applicability of Hester's "open fields" doctrine in the wake of Katz to open, undeveloped, and rural areas.

- B. The Maine Supreme Judicial Court erred in holding that Respondent Thornton had a reasonable expectation of privacy in his fenced and posted woods surrounding his secluded marijuana patches.

The Maine Supreme Judicial Court erred in holding that Fourth Amendment protection attached to Thornton's rural woods. The primary source of this error was the Court's requiring two prerequisites for the applicability of Hester's "open fields" doctrine - that (1) the officers be

lawfully on Respondents's land and (2) Thornton's cultivation of marijuana be conducted openly (Thornton, 453 A.2d at 495; Pet. App. A21). The first prerequisite is discredited by Hester itself and this Court's decisions from Katz to Knotts, and the second concerns only whether there is a subjective expectation of privacy, not its reasonableness. Given the kinds of human activities that ordinarily occur in open fields, rural woods, and outdoor areas in general, a subjective expectation manifested by conducting an activity outdoors in a secluded location is not "one that society is prepared to recognize as 'reasonable.'" Katz, 389 U.S. at 361 (Harlan, J., concurring). Therefore, it is not entitled to Fourth Amendment protection and does not preclude application of the "open fields" doctrine.

Applying Hester's "open fields" doctrine as a bright-line rule to the facts in this case can only result in the conclusion that Thornton's subjective expectation of privacy in his fenced and posted woods was unreasonable and that the officers' observations of his marijuana patches were outside the scope of his Fourth Amendment protection. The patches themselves were located about 500 feet from the Thornton house in a small clearing in rural woods (J.A. 35-36 (Crandall)), and in their warrantless visit to the patches the officers never came near the house. Therefore, neither a warrant nor probable cause was necessary to make these observations, and the opinion of the Maine Supreme Judicial Court holding to the

contrary should be reversed.¹³

13 The applicability of Hester's "open fields" doctrine to the facts of the instant case depends on whether Respondent Thornton's Fourth Amendment rights extend to his rural woods. Unfortunately, the courts below mistook to a great extent exactly what they were deciding and imposed the burden of proof on the State to show that the officers' warrantless visit to Thornton's woods fell within one of the exceptions to the warrant requirement. (J.A. 24-25; Pet. App. B3 (Maine Superior Court); Thornton, 453 A.2d 492 n.2; Pet. App. A6 n.2; see also 453 A.2d at 495; Pet. App. A19 (quoting State v. Crider, 341 A.2d 1, 5 (Me. 1975)), where Maine Supreme Judicial Court erroneously placed burden of proof on State to show that Thornton's expectation of privacy in his woods was unreasonable). Pursuant to Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978), however, the initial burden should have been on Thornton to establish a legitimate expectation of privacy in his woods, especially since the State's Attorney at the outset of the hearing on Thornton's motion to suppress claimed that the Fourth Amendment was inapplicable to the instant case (J.A. 24-24A) and never departed from that position (J.A. 123-24, 134-36).

The Maine Supreme Judicial Court also noted that since the State's Attorney acquiesced in the Suppression Hearing Justice's placement of the burden on the State to prove an exception to the warrant requirement, the State must have either conceded or waived "the issue of the occurrence of a search." Thornton, 453 A.2d at 493 n.3; Pet. App. A12 n.3. However, the


13 cont. burden of going forward with evidence (J.A. 25), never deviated from his initial position that Trooper Crandall and Constable Hartford conducted "a permissible open field type of search" into an area where Respondent had no reasonable expectation of privacy and no Fourth Amendment rights. (J.A. 123-24, 134-36 (closing argument)). Hence, the State never conceded or waived the "standing" issue, raised by the State's Attorney at the outset of the hearing (J.A. 24-24A), that the Fourth Amendment did not apply to the officers' warrantless visit to Thornton's property.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton, 453 A.2d 489 (Me. 1982), should be reversed.

Respectfully submitted.

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CERTIFICATE OF SERVICE PURSUANT TO
U.S.SUP.CT. RULES 28.5(b) AND 35.7


I, Wayne S. Moss, Counsel of Record
for Petitioner State of Maine and a member
of the Bar of the Supreme Court of the
United States, hereby certify that pur-
suant to U.S.Sup.Ct. Rule 28.3 I have
caused three (3) copies of the State of
Maine's "Brief for Petitioner" and
"Joint Appendix" to be served on each
other party to this proceeding by
depositing said copies in a United States
Post Office, with first-class postage
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FILED

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ALEXANDER L. STEVAS.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF MAINE,

Petitioner,

v.

RICHARD THORNTON,

Respondent.

On Writ Of Certiorari To The Supreme
Judicial Court Of The State Of Maine

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WHETHER THE MAINE SUPREME JUDICIAL COURT CORRECTLY CONSTRUED THE MAINE CONSTITUTION ARTICLE 1 SECTION 5 AND THE FOURTH AMENDMENT BY HOLDING THAT THE "OPEN FIELDS" DOCTRINE OF *HESTER v. UNITED STATES*, 265 U.S. 57 (1924), WAS INAPPLICABLE TO THE INSTANT CASE—WHEREIN POLICE OFFICERS WARRANTLESSLY ENTERED A HEAVILY WOODED AREA OF MR. THORNTON'S 38-ACRES RURAL PROPERTY WHERE THE PROPERTY WAS POSTED WITH NO TRESPASSING AND NO HUNTING SIGNS, ENCIRCLED BY A STONE WALL AND BARBED WIRE FENCE, WHERE THE AREA SEARCHED WAS A SECLUDED LOCATION IN HIS WOODS WHERE MARIJUANA WAS ALLEGEDLY FOUND, WHICH AREA COULD NOT BE SEEN FROM NEIGHBORING LANDS, MR. THORNTON'S HOUSE OR DRIVEWAY, AND WHERE MR. THORNTON EXCLUDED THE PUBLIC FROM HIS LAND.

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OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court affirming the trial court's decision to suppress the seized evidence is reported at *State v. Thornton*, 453 A.2d 489 (ME. 1982), which reported opinion is reproduced in Respondent's Response to Petition for a Writ of Certiorari in the appendix at pages A1 through A8. This opinion is also reproduced in the appendix of the State of Maine's printed Petition for a Writ of Certiorari at pages A1 to A26.

The order of the Superior Court of Maine suppressing the evidence seized is reproduced in the appendix of the printed Petition for a Writ of Certiorari at pages B1 to B8.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

The opinion and judgment of the Supreme Judicial Court of Maine, in *State v. Thornton*, 453 A.2d 489 (Me. 1982), was entered on December 6, 1982, and the Court's mandate issued on the same day. The State of Maine's Petition for a Writ of Certiorari was timely filed on January 31, 1983, within the 60-day filing period set forth in U.S. Sup. Ct. Rule 20.1.

Respondent however states there is sufficient reason to dismiss the Writ on the basis that the opinion of the Maine Supreme Judicial Court was made on adequate and independent state grounds, which argument will be discussed below.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 5 of the Maine Constitution provides as follows:

The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.

17-A Maine Revised Statutes Annotated provides as follows:

§ 1106. Unlawfully furnishing scheduled drugs

1. A person is guilty of unlawfully furnishing scheduled drugs if he intentionally or knowingly furnishes what he knows or believes to be a scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such furnishing is either:

- A. Expressly authorized by Title 22; or
 - B. Expressly made a civil violation by Title 22.
2. Violation of this section is:
- A. A Class C crime if the drug is a schedule W drug; or

- B. A Class D crime if the drug is a schedule X, Y or Z drug.
- 3. A person shall be presumed to be unlawfully furnishing a scheduled drug if he intentionally or knowingly possesses more than 1½ ounces of marijuana.

STATEMENT OF THE CASE

On August 3, 1981, Carroll E. Crandall, Maine State Trooper filed an affidavit describing his warrantless search of Respondent Richard Thornton's property and also describing the information given to him by a "reliable, cooperating citizen." The affidavit appeared in pertinent part as follows:

On information and belief supplied by a *reliable, cooperating citizen* that on or about the thirty-first day of July, A.D. 1981, in Hartland, County of Somerset and State of Maine, that said citizen did observe marijuana plants growing in several areas penned in by wire mesh in a wooded area *behind the residence of Richard Thornton* at Davis Corner Road, Hartland, Maine.

That your affiant *went to said wooded area* on August 3, 1981, and discovered marijuana plants growing at the place and position behind the said residence as described by said reliable informant. (Emphasis Supplied)

(J.A. 5).

Trooper Crandall testified at the suppression hearing that said unidentified informant did observe "what he thought to be" marijuana plants growing in a wooded area "behind the residence" of Richard Thornton (J.A. 27). However, at that time Officer Crandall "didn't know who owned the property" (J.A. 37), but "just figured it in [his] own mind that it was on Mr. Thornton's property" (J.A.

38). In fact, Officer Crandall testified that "the informant didn't tell me what property it was, he didn't know" (J.A. 61).

Trooper Crandall testified that he didn't get a search warrant because of the informant's tip prior to searching the Respondent's property because "he didn't know exactly where the marijuana was, nor whose property it was on," and "didn't feel without checking it that [he] had enough information" (J.A. 68).

As described in the affidavit, Trooper Crandall and Constable Arnold Halford went to the Thornton property on the morning of August 3, 1981, and made a warrantless search for marijuana, stating "we just walked in and observed where the . . . patch was, and then backed off." (J.A. 68). They didn't seize the marijuana at that time because the officer figured if he was going to seize it "right," he "should probably get a warrant." (J.A. 68).

The officers testified that they entered the Thornton property by walking over the land belonging to the "Leavitts" (J.A. 121, 122, 32-36) travelling in a northerly direction approximately 200 to 300 feet behind the Leavitt mobile home and reached an overgrown tote road (J.A. 73, 74) which led from the Thornton driveway (J.A. 90, 91). They followed the tote road from the main road (Davis Corner Road) not more than five hundred feet and found two small fenced-in enclosures where they believed marijuana was growing. (J.A. 71, 72).

The area where Respondent resides is a rural area (J.A. 30, 41) and the specific land is owned and occupied by Mr. Thornton and is heavily wooded (J.A. 73, 74). Respondent owns approximately 30 acres there. (J.A. 84). The boundaries of his property are marked by an old stone wall and a barbed wire fence that goes all around

the property (J.A. 89). Even though the stone wall was old, it was not possible to get into the land without knowing that you were going over it. (J.A. 111, 112). In addition, the perimeter of the property was posted with No Trespassing signs from both the main road (Davis Corner Road) and where one would come onto the property from another's land (J.A. 89, 90, 91, 92). There were approximately nine No Trespassing signs, three of which were posted on the Davis Corner Road (J.A. 90). No individuals were allowed to routinely pass through the Thornton property to get to the road or to any other property (J.A. 100, 101).

The two alleged marijuana patches were found approximately 250 feet from Respondent's driveway and adjacent to an overgrown foot path or so-called tote road (J.A. 96), not 500 feet from Thornton's house as stated by Petitioner in its brief at page 5.

The footpath or "tote" road was described throughout the hearing as being grown up. Trooper Crandall described the footpath as follows: "Well, it hadn't been used by a vehicle for quite some time. There was nothing to indicate that it had been used for anything other than a footpath" (J.A. 39).

Respondent's wife, Linda Thornton, described where the footpaths were on Exhibit 12 (an aerial photograph of the property) (J.A. 22), (Pl. Ex. J.A. 54, 55, 57) and testified that the footpaths had grown up considerably since 1975 when the photo was taken (J.A. 85). Constable Halford corroborated the description by agreeing that the woods road was basically a footpath. (J.A. 121). The fenced-in enclosures where marijuana was allegedly found were not visible from the public road, from Respondent's driveway or residence or from any other point outside Respondent's property (J.A. 94, 95, 62, 63, 64, 65).

When Trooper Crandall was asked why he waited three days after receiving the informant's tip before he got a search warrant, he testified that he "figured the marijuana was still there, and there didn't appear to be anybody right near it at the time . . ." (J.A. 67, 68).

After making his warrantless search, Trooper Crandall obtained a search warrant from the complaint justice of the Somerset County District Attorney's Office. (J.A. 39, 40). He and Constable Halford then, along with other police officers, made a second search of Respondent's property, where a small amount of marijuana was allegedly seized.

On August 3, 1981, Respondent Thornton was given a complaint for unlawfully furnishing Schedule Z drugs in violation of 17-A Maine Revised Statutes Annotated (M.R.S.A.), section 1106. (J.A. 14-15).¹

On April 9, 1982, Morton A. Brody, Justice, Maine Superior Court, granted Respondent Thornton's motion to suppress for use as evidence, articles and items that were unlawfully seized from the property of Respondent, as well as all statements and/or admissions that may have been made by Thornton as the result of said illegal search and seizure, as well as testimony or comment. (Pet. App. B3-B8).

¹ It is significant to note that Respondent Thornton was charged with "furnishing" because under Maine Law the possession of any amount of marijuana exceeding one and one-half (1½) ounces constitutes the charge of "furnishing marijuana." In the present case, Officer Crandall testified that the police had no evidence that Respondent Thornton was actually furnishing marijuana to anyone. (J.A. 42).

The Superior Court Justice noted that the District Attorney at the hearing,

Abandoned any claim that the informant citizen was reliable and credible enough that his information, standing alone, constituted probable cause for the warrant which issued. At any rate, no evidence as to the grounds upon which that informant's reliability or credibility could be established, *or any evidence of corroborating circumstances* as to the informant's observation, appears in the affidavit or was introduced at the hearing, beyond the conclusionary allegation of reliability. Absence such support for the informant, probable cause for the warrant must be based on the observations of the affiant officer. (Emphasis Supplied.)

The central issue on this motion, then, is whether the visit by Trooper Crandall to the Defendant's property on July 31, 1981, which the District Attorney conceded was a warrantless search, comes within any exception to the warrant requirement . . . The State bears the burden of proof on this issue. If no such exception is found, then the search would be unlawful, and thus tainted, and observations made cannot serve to provide probable cause for the warrant.

(Pet. App. B2-B3)

The Court noted further that the testimony of both Trooper Crandall and Constable Halford² indicated that they had no license to be on the Respondent Thornton's property; their intent was to corroborate the informant's tip. While noting the fact that the fenced enclosures where the marijuana was allegedly found were not visible from either the public road, from Thornton's driveway or residence, or from any other point outside the property

² Incorrectly spelled in the Order as "Hartford."

upon neighboring land and that the perimeter of the property was posted with a number of No Trespassing signs and that the property was bounded by the stone wall and barbed wire fence, the Maine Superior Court held:

As is evident from the secluded location chosen for his horticultural enterprise, the Defendant had no intent to expose the enclosures to either public or police view. The intent to avoid casual public view, and the efforts taken to generally exclude the public from his wooded property, indicates that the Defendant had a reasonable expectation of privacy thereon. The officers were not innocently upon any property *open to the public* (the footpaths or tote road was evidently not a public way), or in an area in which ownership of the land was unknown. Neither were the officers lawfully upon any neighboring property when they discovered the marijuana . . . the Court does not find that either the plain view or open fields exception to the warrant requirement is applicable . . . (Emphasis Supplied.)

(Pet. App. B. 5, 6)

The Superior Court went on to distinguish this case from the case of *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), noting that the inspector in that case entered the premises where the public had not been excluded. (Pet. App. B. 6)

Accordingly, the Superior Court found that the warrantless search was an unreasonable and unlawful violation of the Defendant's rights and the observations from it could not provide probable cause for the subsequently issued warrant.

The State of Maine took an appeal to the Maine Supreme Judicial Court. Petitioner argued that Thornton had no expectation of privacy in the property searched

because Petitioner claimed that the area searched was "open." Petitioner also contended that the Superior Court had found that the "open fields" doctrine was not viable even though the Superior Court Justice did not so hold and stated that the doctrine was, in fact, still viable. (Pet. App. B. 6)

The Maine Supreme Judicial Court affirmed the opinion of the Superior Court holding that the Respondent had a reasonable expectation of privacy in the area searched and that the "open fields" doctrine was not applicable to justify the observations by the police officers on Respondent's land as the Respondent made every effort to conceal his activity, and the officers were never legitimately on the property since they entered the land without a warrant and within no exception to the warrant requirement for the specific purpose of verifying the information to be used against the Respondent. (Pet. App. A22, A23, A25, A26)

SUMMARY OF ARGUMENT

Petitioner, State of Maine, has not shown that the judgment of the Maine Supreme Judicial Court did not rest on an adequate and independent state grounds. *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958). The Maine Supreme Judicial Court analyzed its entire record of Maine cases regarding the area of search and seizure and noted that those cases were in accord with *Katz v. United States*, 389 U.S. 347 (1967), in holding that Respondent Thornton had a reasonable expectation of privacy in the area searched on his private property. Further, the Maine Supreme Judicial Court noted that the "open fields" doctrine was still viable in Maine, and cited case law to support its conclusion. (Pet. App. 20)

While Petitioner does not contend that the Maine Supreme Judicial Court granted Respondent Thornton more rights than those guaranteed by the United States Constitution, certainly state courts are always free to grant individuals more rights than those guaranteed by that Constitution, so long as it does so on the basis of state law, therefore, pursuant to this and the above analysis, the Writ of Certiorari should be dismissed as improvidently granted and/or the Judgment should be affirmed.

The Maine Supreme Judicial Court was correct in holding that pursuant to state law the "open fields" doctrine of *Hester v. United States*, 265 U.S. 57 (1924) was not applicable to the instant case. The evidence in the present case indicates that the *wooded* area where the marijuana was allegedly growing, was within two fenced enclosures, was adjacent to an overgrown footpath or so-called tote road in the western part of Respondent's 38-acre rural property. The enclosures were not visible either from the public road, from Respondent's driveway or residence in the eastern part of the property, or from any other point outside the Respondent's property, upon neighboring land. The perimeter of the Respondent's property was posted with a number of signs prohibiting trespassing and hunting, and was encircled by barbed wire and stone wall. Using both the *Katz* analysis of a reasonable expectation of privacy, as well as previous Maine case law, and rejecting the applicability of the "open fields" doctrine to the facts of the present case, the Maine Supreme Judicial Court correctly held that the warrantless search was a violation of Respondent's right, in that Respondent's conduct evidenced the clear expectation of privacy for the above reasons and also because Respondent generally excluded the public from his land.

The Maine Supreme Judicial Court's analysis of the applicability of a reasonable expectation of privacy analysis to search and seizure questions was exhaustive wherein the court followed both the subjective and objective standards set forth in the concurring opinion in *Katz*, 389 U.S. at 361.

Petitioner's contention that any subjective expectation of privacy in a wooded area, even one that is fenced, posted and secluded, is *per se* unreasonable flies in the face of previous Maine case law wherein the Maine Supreme Judicial Court stated that "it has never been the law of the State of Maine that any expectation of privacy for activity conducted in an area accessible to the public is *per se* reasonable." (Pet. App. A19)

Petitioner's *per se* rule that any subjective expectation of privacy in a wooded area is always objectively unreasonable for purposes of the Fourth Amendment protection must fail because it contemplates an extremely restrictive reading of *Katz* and ignores *Katz's* rejection of *Olmstead's* constitutionally protected area analysis. *Olmstead v. United States*, 277 U.S. 438 (1928). Petitioner's theory also transforms the area searched in the present case which was not even a field, as a matter of fact, into an "open" field. In addition, the tenor of the *Katz* opinion is that it changed the standard Fourth Amendment protection in most, if not all, factual situations.

Even the most recent case of *Air Pollution Variance Board v. Western Alfalfa*, 416 U.S. 861 (1974) where the "open fields" doctrine was applied is distinguishable from the present case. In *Air Pollution Variance Board*, the inspector was on the premises from which the public had not been excluded. *Id.* at 865.

Further, the Maine Supreme Judicial Court was correct in applying its prerequisites for determining whether the "open fields" doctrine applied: (1) the openness of which the activities were pursued and (2) the lawfulness of the officer's presence during their observation of what is open and patent. First, if the activity was not pursued in the open, it could not be an open field. Second, the lawfulness of the officer's presence was analyzed in *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) and in *Harris v. United States*, 390 U.S. 234 (1968) where the "open fields" doctrine was applied to both cases.

ARGUMENT

I. The Judgment Of The Maine Supreme Judicial Court Rested On Adequate And Independent State Grounds.

Where an adequate and independent State ground exists for a decision, this Court does not review the federal question in order to preserve the proper division of authority between state and federal courts. *Murdock v. City of Memphis*, 20 Wall. 590 (1875). In the case of *Herb v. Pitcairn*, 324 U.S. 118, (1945), this Court stated:

... Our only power over state judgments is to correct them to the extent that they indirectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views on federal laws, our review could amount to nothing more than an advisory opinion.

325 U.S. 118 at 125-126.

State courts are the final interpreters of State Law even though their actions are reviewable under the Federal Constitution. The Supreme Court of any state is

the highest court in terms of this body of law and it is not a "lower court," even in relation to this Court. It must follow this Court's rulings on the meanings of the Constitution, but it is free to interpret State Laws or the State Constitution in any way that does not violate those principles. See generally *Herb v. Pitcairn, Id.*

The State of Maine has consistently recognized that its standard for testing a legality of a search and seizure can be no *lower* than the constitutional standards mandated by the Constitution of the United States as interpreted by the United States Supreme Court. *State v. Barlow*, 328 A.2d 895 (Me. 1974), *State v. Hawkins*, 261 A.2d 255 (Me. 1970). The Maine Supreme Judicial Court has never noted that the standard for testing the legality of the search and seizure must be exactly that which has been interpreted by the United States Supreme Court.

The State's power is an extremely important one, for it means that the State Courts are always free to grant individuals more rights than those guaranteed by the Constitution, so long as it does so on the basis of State Law. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). The Federal Constitution establishes *minimum* guarantees of rights and the granting of additional liberties does not violate its provisions.

It follows that as the state courts are not "lower courts," they are not required to follow the interpretation of lower federal courts, such as the Court of Appeals with jurisdiction over their state territory, even on matters relating to the Constitution of the United States. Certainly in the present case, the Supreme Judicial Court of Maine is not bound by the Court of Appeals' decision in *United States v. Oliver*, 686 F.2d 356 (6th Cir. 1982)

decided in a court which does not have jurisdiction over this state territory.³

In a recent case, the Writ of Certiorari was dismissed as improvidently granted when it was found that the judgment of the court below rested on independent and adequate state grounds. *Florida v. Constantino Casal and Omar Garcia*, 51 U.S.L.W. 48827 (No. 81-2318), decided June 17, 1983. In that case, this Court concluded that the Florida Supreme Court relied on independent and adequate state grounds when it affirmed the suppression of over 100 pounds of marijuana discovered aboard a fishing vessel. In that case, the Florida Court did not expressly declare that its holding rested on state grounds, and the principal case cited for the probable cause issue was based upon this Court's interpretation of the Fourth Amendment of the Federal Constitution.

³ It is significant to note that the Maine Supreme Judicial Court decided *Maine v. Thornton*, 453 A.2d 489 (Me. 1982) in a manner consistent with the First Circuit Court, as will be discussed below.

Since *State v. Thornton, Id.* and *United States v. Oliver*, 686 F.2d 356 (1982) have been consolidated for purposes of this Court's review, it may be helpful to generally distinguish the two cases.

In *Oliver* the size of the "field" was approximately 8 acres; however, in *Thornton* there was no field, there was only a cleared area measuring less than an eighth of an acre; in *Oliver* the police searched by traveling the farm road and in *Thornton* the police went through the woods via an overgrown footpath; in *Oliver* the property was leased to a third-party; in *Thornton* the property was owned by *Thornton* himself; the geography in *Oliver* was partly wooded and partly open, and in *Thornton* it was exclusively wooded except for the two tiny areas searched and a small vegetable garden; the *Oliver* property was blocked by a gate and fence on one side; in *Thornton* the entire area was surrounded by either a stone wall or a barbed wire fence, and the area where the marijuana was allegedly found was also separated by a chicken wire fence.

Respondent is certainly not arguing that the decision of the Maine Supreme Judicial Court is inconsistent or even broader than the rulings of this Court on the applicability or interpretation of the Fourth Amendment; however, Petitioner's argument is only that this state should not be put to the test in the current case, because if there is inconsistency, that inconsistency would be a grant of more protection to its citizens against unreasonable searches and seizures, which is permissible.

Even though the Supreme Judicial Court in the present case made reference to the Fourth Amendment of the Constitution and *Katz v. United States*, 389 U.S. 347 (1967), that does not mean that their decision did not rest on independent and adequate grounds. It is clear that even though the above citations were included in the court's opinion that the court was relying on its own state law when it suppressed the evidence in the present case. The Maine Supreme Judicial Court stated in its opinion after discussing *Katz* and *Hester*:

"The Maine cases are in accord. We noted after *Katz* that:

[T]he issue of whether government action does or does not constitute a search is understood to depend less upon the designation of the area . . . than upon a determination of whether the examination is a violation of privacy on which the individual justifiably relied as secure from invasion.

State v. Gallant, 308 A.2d 274, 278 (Me. 1973) . . .
State v. Sapial, 432 A.2d 1262, 1266 (Me. 1981)
 . . . *State v. Rand*, 430 A.2d 808, 818 (Me. 1981) . . .
Sweatt, 427 A.2d at 945 . . . *State v. Albert*, 426 A.2d
 1370, 1373 (Me. 1981) . . . *Blais*, 416 A.2d at 1256,
State v. Johnson, 413 A.2d 931, 933 (Me. 1980) . . .
State v. Littlefield, 408 A.2d 695, 697 (Me. 1979) . . .
State v. Barclay, 398 A.2d 794, 798 (Me. 1979) . . .

State v. Dow, 392 A.2d 532, 535 (Me. 1978) . . . *State v. Cowperthwaite*, 354 A.2d 173, 175-76 (Me. 1976) . . . *State v. Hamm*, 348 A.2d 268, 272 (Me. 1975) . . . *State v. Crider*, 341 A.2d 1, 4 (Me. 1975) . . . *State v. Koucoulas*, 343 A.2d 860, 868 (Me. 1974) . . . *State v. Richards*, 296 A.2d 129, 134 (Me. 1972) . . . *State v. Stone*, 294 A.2d 683, 688-89 (Me. 1972) . . . *Poulin*, 268 A.2d at 480, *McKenzie*, 161 Me. at 137 to 210 A.2d at 32. (453 A.2d at 493-494)

It has never been the law of *this state* that any expectation of privacy for activity conducted in an area accessible to the public is *per se* unreasonable . . . (citing *State v. Crider*, 341 A.2d 1 (Me. 1975)).

Even in the Court's discussion of the "open fields" doctrine, the Maine Supreme Judicial Court clearly ruled on a standard established in Maine regarding the applicability of the "open fields" doctrine.

"*In Maine*, for the "open fields" doctrine to apply, two factual aspects of the circumstances must be considered . . . *Peakes*, 440 A.2d at 353. . . *Dow*, 392 A.2d at 535 . . . *Stone*, 292 A.2d 689."

453 A.2d at 495.

Even if the judgment of state court rests on two grounds, one of which is federal and the other non-federal in character, this Court's jurisdiction must fail if the non-federal ground is independent of the federal ground and adequate to support the judgment. See *Fox Film Corporation v. Muller*, 296 U.S. 207 (1935). Therefore, even if the Maine Supreme Judicial Court did not mention the Fourth Amendment or *Katz*, it is clear that the Court's opinion rested on adequate and independent state ground, as certainly the evidence would be suppressed under the Maine Supreme Judicial Court's exhaustive analysis.

Petitioner, therefore, has not shown that the judgment of the Maine Supreme Judicial Court did not rest on adequate and independent state ground. *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958).

II. The "Open Field" Doctrine Of *Hester v. United States*, 265 U.S. 57 (1924), Is Not Applicable To The Instant Case.

Petitioner contends that the Maine Supreme Judicial Court erroneously held that Respondent Thornton was entitled to Fourth Amendment protection pursuant to *Katz v. United States*, 389 U.S. 347 (1967), wherein he was found to have had a reasonable expectation of privacy. The State also contends that the Maine Supreme Judicial Court did not explain why Thornton's subjective expectation of privacy was objectively reasonable (Br. 14, 15). Petitioner does not contest the finding that Thornton had a subjective expectation of privacy.

Although the Maine Supreme Judicial Court did cite *Katz v. United States*, 389 U.S. 347 (1967), it is clear that its decision relied on the Court's analysis of an individual's right under the Maine Constitution and previous Maine case law. The Supreme Judicial Court noted that the Maine cases after *Katz* are in accord with the *Katz* decision, 453 A.2d at 493-494. After conducting a thorough examination of the Maine cases where a reasonable expectation of privacy analysis was used, the Maine Supreme Judicial Court went on to state that in the present case, Respondent Thornton's conduct evidenced a clear expectation of privacy. 453 A.2d at 494-495; Pet. App. A. 18, 19.

He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.

453 A.2d at 494; Pet. App. A. 18.

The Maine Supreme Judicial Court did not "assert without further explanation" as Petitioner contends that Thornton's "subjective expectation of privacy was objectively reasonable." (Br. 15). To the contrary, the Court explained that it had never been the law of the State of Maine that any expectation of privacy for activity conducted in an area accessible to the public is *per se* unreasonable. Rather, the Court stated that the proper inquiry must be:

Having in mind the purposes to be served by the Fourth Amendment, made applicable to the States by the Fourteenth, should we not disregard such conclusory property law concept and determine the reasonableness of the police entering by responding to the following relevant inquiry, what under all the existing circumstances, if any, wholly defeated or partially reduced under the law the *reasonable expectation* of privacy which the occupants . . . had a right to entertain? (Emphasis Supplied.)

Crider, 341 A.2d at 5. 453 A.2d at 495; Pet. App. A. 19.

The Maine Supreme Judicial Court found nothing that could be taken to have wholly or partially defeated or reduced Respondent Thornton's reasonable expectation of privacy except the officers' search of Respondent's property.

It is interesting to note that Petitioner contends that *Katz* does not apply to the facts of the present case, however, it argues that Respondent has not proven that his subjective expectation of privacy was objectively reasonable pursuant to the theory set forth in *Katz*.

In any case, Petitioner erroneously infers that the Maine Supreme Judicial Court found only that Respondent had a "subjective" expectation of privacy (Br. 15). The Maine Supreme Judicial Court, as well as the Maine

Superior Court, were thoroughly versed with the test set forth in the concurrence in *Katz* which required that the subjective expectation of privacy be one that society is prepared to recognize as reasonable. 389 U.S. at 361.

In both Respondents' brief to the Maine Superior Court and in the brief to the Maine Supreme Judicial Court, the above test and case law were discussed showing that Respondent's expectation of privacy was clearly objectively reasonable. Recent case law, including the case of *Smith v. Maryland*, 472 U.S. 735 (1979), has followed *Rakas v. Illinois*, 439 U.S. 128 (1978) and other cases decided by this Court, in holding that a subjective expectation of privacy is reasonable if it: (1) is a privacy expectation normally shared by people in that setting; and (2) it falls within some tolerance level which represents the limits of what society can accept given its interest in law enforcement. *Rakas* at 439 U.S. at 143-144 n. 12. See also *Katz v. United States*, 389 U.S. at 361 (concurring opinion).

It is clear also that this Court has continued to follow *Rakas*, *Id.* in its most recent case of *Illinois v. Gates*, 51 U.S.L.W. 4709 (No. 81-430) (decided June 8, 1973), and a strict application of Fourth Amendment protection against *warrantless* searches, wherein this Court stated:

This evolvement in the understanding of the proper scope of the exclusionary rule embraces several lines of cases. First, standing to invoke the exclusionary rule has been limited to situations where the Government seeks to use such evidence against the victim of the unlawful search. *Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165 (1969); *Wong Sun v. United States*, 371 U.S. 471, 491-492 (1963); *Rakas v. Illinois*, 439 U.S. 128 (1978).

Illinois v. Gates, 51 U.S.L.W. 4709 at 4720.

In the present case it is clear that Respondent's subjective expectation of privacy was reasonable. The facts are similar to those in the *United States v. Holmes*, 521 F.2d 859 (6th Cir. 1975), in which the government appealed an order granting motions to suppress marijuana seized by a warrantless search. In arguing that the owners had no expectation of privacy, the Court disagreed with the government, observing:

The government would have us ignore the *character* of the Moody property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of the casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush by putting up signs warning the government to keep away. Even in the present case, the Respondent did put up signs prohibiting trespassing. (Emphasis supplied).

521 F.2d at 870.

The right of a property owner to exclude others creates the presumptively legitimate expectation of privacy. [See *Rakas*, 439 U.S. at 144 n. 12 ("one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude").]

The Maine Supreme Judicial Court also noted that Thornton made every effort to conceal his activity, nothing about his enterprise was open, patent or knowingly exposed to the public. The Court further noted that under the circumstances the State failed to demonstrate the legitimacy of the officers' position of observation and the openness of the conduct of Thornton to prove that Respondent's subjective expectation of privacy was not objectively reasonable. 453 A.2d at 494-495; Pet. App. A. 18, 19, 22, 23.

Recent case law has established that a subjective expectation of privacy is reasonable if it: (1) is a privacy expectation normally shared by people in that setting; and (2) it falls within some tolerance level which represents the limits of what society can accept given its interest in law enforcement. See generally *Mincey v. Arizona*, 437 U.S. 385 (1978); *U.S. v. Dorsey*, 591 F.2d 922 (D.C. Cir. 1978).

In the present case, Respondent's expectation of privacy was a reasonable one. Society's interest in law enforcement was not unduly hampered by requiring a warrant prior to searching Respondent's private property. Certainly the Fourth Amendment warrant requirement has not prevented satisfactory law enforcement in other areas in which it has been applied. The policy is to encourage officers of the law to seek to the fullest extent feasible the objective judgment of a magistrate on the probability that a crime is being committed *before* permitting entry on the property of private citizens. The device of the intervening step between clues and search is calculated to substitute the inferences of a neutral and detached magistrate for the inferences of a committed officer in the heat of ferreting out crime. *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966). Society cannot reasonably expect Thornton to build solid, impenetrable walls around his secluded property. *Burkholder v. Superior Court*, 96 Cal.App.3d 421, 158 Cal.Rptr. 86 (1979).

- A. In terms of *Katz*, *Hester* does not represent a *per se* rule that any subjective expectation of privacy in open fields or wooded areas is unreasonable.

Petitioner contends that *Hester* in a modern Fourth Amendment analysis should stand for the proposition that any subjective expectation of privacy, not only an open field but also any wooded area, even one that is

fenced, posted and secluded, is *per se* unreasonable, and, therefore, the Maine Supreme Judicial Court's two prerequisites for applying the "open fields" doctrine are inappropriate.

Petitioner cites *Katz*, for the proposition that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." (Br. 27). Petitioner then sets forth its own theory that any trespass or intrusion by a police officer on an individual's land should not even be *considered* when deciding upon the reach of the Fourth Amendment. Petitioner goes on to say that the State's use of the two prerequisites to the application of the "open fields" doctrine is inappropriate (Br. 29).

Petitioner attempts to invalidate the use of the lawfulness of the officers' presence "as a prerequisite to the application of the 'open fields' doctrine." However, this application cannot be inappropriate because an individual's "legitimate expectation of privacy" must be *invaded* by the government; if there is no invasion, there is no constitutional violation (i.e., no search). Therefore, the State's prerequisite involving the lawfulness of the officers' presence merely goes to the proposition that there must be an invasion of an expectation of privacy, and in the present case, there must have been a "search" by the police officers.

Pursuant to the above analysis then, under Maine law and the opinion of *State v. Thornton*, a police trespass may constitute an invasion of a constitutional right; however, there is no *per se* invasion. Contrary to Petitioner's contention, the State Court's opinion does not *turn* on the

fact that there was a physical trespass. To the contrary, the Maine Supreme Judicial Court stated that:

The State must demonstrate the legitimacy of the officers' position of observation and the openness of the conduct in order to prove that the expectation of privacy is not *objectively* reasonable and that, therefore, police observations do not constitute a search.

In the present case, the Court went on to say:

... the officers were never legitimately on Defendant's property; they entered the Defendant's land without a warrant, and *within no exception to the warrant requirement*, for the specific purpose of verifying information to be used, ultimately against him. (Emphasis Supplied)

Thornton, 453 A.2d at 495-496; Pet. App. A22-A23.

It is important to note that the Maine Supreme Judicial Court cited various Maine cases where there was a physical trespass by police officers which trespass *did not* constitute an "invasion" (or search) protected by the Fourth Amendment, such as *State v. Johnson*, 413 A.2d 931, 933 (Me. 1980) (Knowledge of dead body on premises created exigent circumstances permitting warrantless entry); *State v. Crider*, 341 A.2d 1 (Me. 1975) (No invasion of privacy when police enter without force, in hallway of multi-unit dwelling in furtherance of investigation).

Petitioner's assumption that because the Court in *Katz* stated that "the reach of the Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure" does not mean, as Petitioner infers, that *Katz* stands for the proposition that the police are given carte blanche authority for trespassing on private property in order to obtain evidence to be used against any Defendant without any excuse for such trespass.

Moreover, *Katz* holds that searches conducted outside the judicial process, without prior approval by Judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. *Katz v. U.S.*, 389 U.S. at 357. Therefore, Petitioner's trespass theory must fail.

Before a discussion is had on the appropriateness of Petitioner's analysis of the theory of "open fields," it is important to point out perhaps the most fatal flaw in Petitioner's reasoning throughout its entire brief and the flaw in the State's reasoning with the Maine Courts in this case. Petitioner continues to treat Thornton's property as an "open field," even though both the Maine Superior Court and Maine Supreme Judicial Court held as a *matter of fact* that the area searched on Thornton's property was *not akin* to an open field. The Supreme Judicial Court noted:

We note that the State's erroneous assumption that . . . the scene of the criminal activity occurred in an area akin to an 'open field' precludes the need for further Fourth Amendment analysis. The determination of a lawful search and seizure under Fourth Amendment analysis does *not* involve plugging in one of the several mutually exclusive theories or doctrines such as the 'open fields' doctrine, depending on the particular facts.

495 A.2d at 496; Pet. App. A23-A24.

On the facts of the present case, the area searched was neither "open" nor a "field." Since there was no definition of "open field" in *Hester*, the Maine Courts should be able to find whether or not an area is in fact an open field. To find that the area searched in the present case was not an open field, is clearly not erroneous.

The Maine Supreme Judicial Court in Thornton stated that it never rejected the open fields doctrine, however it simply found that it did not apply to the facts of the present case.

We have recently noted that after *Katz*, the *Hester* doctrine remains *entirely intact* in Maine and elsewhere. *Dow*, 392 A.2d at 536, [referring to *State v. Dow*, Me. 392 A.2d 532 (1978)], (Emphasis Supplied.)

453 A.2d at 495; Pet. App. A 20.

The *Hester* and *Katz* decisions cannot be reconciled to hold that any area outside the curtilage of the home is not constitutionally protected. Such has never been the law of the State of Maine.

Petitioner's contention that to integrate *Hester* with *Katz* that a modern Fourth Amendment analysis represents a *per se* rule that any subjective expectation of privacy in an open field (and even a wooded area) is always objectively unreasonable for purposes of Fourth Amendment protection (Br. 20, 21) must fail.

There are two major problems with Petitioner's theory: First, the theory contemplates an extremely restrictive reading of *Katz* and ignores *Katz*' rejection of *Olmstead*'s constitutionally protected area analysis. In addition, the tenor of the *Katz*' opinion is that it changed the standard for Fourth Amendment protection in most, if not all, factual situations. See e.g. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (*Katz* applies to on the street situation.); *U.S. v. Rengifo-Castro*, 620 F.2d 230, 233 (10th Cir. 1980) (*Katz* applies to search of closed luggage.)

Second, Petitioner's contention that *Hester* should apply to the present situation broadens the *Hester* holding to apply to any area outside the curtilage, whether or not there were indicia of privacy and whether or not the area

was accessible or visible to the public. Unlike the present case, the area in *Hester* was accessible and visible to the public. Therefore, the argument that *Hester* is cited by *Katz* in later Supreme Court cases does not indicate that *Hester* may be construed beyond its facts to permit searches in areas which are not accessible or visible to the public.

Petitioner's *per se* rule that a reasonable expectation of privacy can never exist in an open field (and even a secluded woods) is a throwback to the antiquated notion of "constitutionally protected areas," which *Katz* prudently laid to rest. In addition, Petitioner's *per se* "protected area" rule includes not only open fields but heavily wooded areas as well. Basing Fourth Amendment rights solely on whether an area searched is inside or outside the curtilage seems to fly directly in the face of this Court's holding in *Katz*.

An analogy can be drawn between a *per se* rule which Petitioner would have this Court apply and the bright line rule of "legitimacy on the premises." The "legitimacy on the premises" rule advanced the notion that a person only had standing to complain of the Fourth Amendment violation if he was legitimately on the premises searched, i.e., had a possessory interest in the premises searched. The Supreme Court in *Rakas v. Illinois*, 439 U.S. 128 (1978), rejected the bright line rule "which at most has superficial clarity and which conceals underneath that center of veneer all the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment." *Id.* at 147. The court favored a case-by-case inquiry into whether the search violated the Defendant's reasonable expectation of privacy. *Id.* at 147-48. The same can be said for the bright line *per se* rule advanced here by Petitioner. Not only is Petitioner's rule fraught

with definitional problems, it avoids true Fourth Amendment analysis of a reasonable expectation of privacy.

The Petitioner complains that this Court must adopt a straight line or *per se* rule to be applied in the present case which would presumably be one capable of resolving all future Fourth Amendment litigation. Respondent Thornton urged that this cannot be done. However desirable it might be to fashion a universal prescription governing the myriad Fourth Amendment cases that might arise, this Court (and the Supreme Judicial Court of Maine) has the burden of construing the Constitution not writing a statute or a manual for law enforcement officers.

In the case of *Ashwonder v. TVA*, 297 U.S. 288 (1966), this Court stated:

Our institutional practice, based upon hard experience, generally has been to refrain from deciding questions not presented by the facts of the case. There are risks in formulating constitutional rules broader than required by the facts to which they are applied.

Id. at 346-348.

It is the above reasoning which the Maine Supreme Judicial Court used in deciding to suppress the evidence in the present case, and it is this reasoning which Petitioner urges this Court to continue using as it relates to a reconciliation between the open fields doctrine and the reasonable expectation of privacy analysis.

The holding of *Hester*, that federal agents could trespass onto an area from which the public was not excluded and view that which was exposed to the public view without violating the Fourth Amendment, remains intact after the *Katz* decision. See *Air Pollution Variance Board v. Western Alfalfa*, 416 U.S. 861 (1974). However, *Olm-*

stead's "constitutionally protected area" rationale has been overruled by *Katz*. Therefore, a modern Fourth Amendment analysis of searches in open fields would provide that warrantless searches for objects not exposed to the public, and located in areas from which the public is excluded, are subject to the reasonable expectations of privacy test of *Katz*.

In order for this Court to reverse the decision of the Maine Supreme Judicial Court, it must find, not only that the *Katz* test of expectation of privacy does not apply to an open field, but it must also hold that the area searched in the present case is in fact an open field. The Court must further hold that any expectation of privacy that an owner might have in an open field is as a matter of law unreasonable.

An analysis of the *Hester* and *Katz* decisions clearly justifies reasonable expectation of privacy analysis, which has been adopted by a plurality of courts in this nation.

In *Hester v. United States*, 265 U.S. 57 (1924), revenue officers concealed themselves in an open field belonging to Hester's father. *Id.* at 58. They observed *Hester* hand a quart bottle to a person named Henderson. *Id.* When an alarm was given, Hester removed a jug from his car and began running with Henderson. *Id.* One of the officers pursued them and fired a pistol. *Hester* dropped the jug, and Henderson threw away the bottle. The officer examined the two containers and recognized the contents as distilled whiskey. Because the officers had not obtained a warrant, *Hester* claimed that his Fourth Amendment rights had been violated. Justice Holmes, writing for the unanimous Court, refused to find the search illegal stating:

It is obvious that, even if there had been a trespass, the above testimony was not obtained by an

illegal search or seizure. The defendant's *own acts*, and those of his associates, *disclosed the jug*, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. . . . 4 Bl. Com. 223, 225, 226.

Id. at 58-59.

Three years after *Hester*, in *Olmstead v. United States*, 277 U.S. 438 (1928), this Court ruled on a search conducted by Federal officers using telephone wire taps. *Id.* at 455. The Defendant claimed the wire taps constituted an illegal search and seizure under the Fourth Amendment. This Court, however, analogized the search to the one conducted in *Hester* by noting that while "there was a trespass, there was no search of a person, houses, papers or effects." *Id.* at 465. This Court concluded that the Fourth Amendment was not violated unless there had been an official search and seizure of a person, his papers, or his material effects, or an "actual physical invasion of his house" or curtilage "for the purpose of making a seizure." *Id.* at 466.

After the decision in *Olmstead*, the *Hester* holding could best be stated as follows: The open field area beyond the curtilage is not an area entitled to Fourth Amendment protection. The *Olmstead* "open fields" doctrine core, was, therefore, that an open field was not a "constitutionally protected area." Because the Court in *Olmstead* failed to define "curtilage," and the *Hester* court failed to define "open field," the result has been that some courts have given a broad interpretation to the "open" component.⁴

⁴ See, e.g., *Janney v. United States*, 206 F.2d 601, 603, 604 (4th Cir. 1953) (Search incident to warrantless arrest valid; fenced land considered open fields under *Hester*). But see *State v. Boynton*, 58

Similarly, some Courts have broadly interpreted "field" beyond the literal definition of a place suitable for pasture or tillage.⁵

However, in *Katz v. United States*, 389 U.S. 347 (1967), this Court rejected the Fourth Amendment "constitutionally protected area" or actual physical invasion analysis epitomized by *Olmstead* in order to trigger the protections of the Fourth Amendment. *Katz* held that the Fourth Amendment protects people, not simply places, against unreasonable searches and seizures. The Court stated:

[W]hether or not a given "area" viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. The Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject for Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-352.

Hawaii 530, 536, 574 P.2d 1330, 1334 (1978) (Search illegal where police informant climbed six foot five foot fence to see marijuana plants). See, e.g., *McDowell v. United States*, 383 F.2d 599, 602-603 (8th Cir. 1967) (Search in open field valid under *Hester* despite "No Trespassing" signs). But see *State v. Byers*, 359 So.2d 84, 86 (La. 1978) (Search illegal where property posted with signs and marijuana not visible from public road).

⁵ See, e.g., *State v. Caldwell*, 20 Ariz. App. 331, 333, 335, 512 P.2d 863, 865, 867 (1973) (Unreasonable to assume marijuana in desert 100 yards from house would not be noticed and reported); *State v. Aragon*, 89 N.M. 91, 94, 547 P.2d 574, 577 (1976) (Upholding search of tin can found on weed-covered, unoccupied property); *Anderson v. State*, 133 Ga. App. 45, 46, 209 S.E.2d 665, 666 (1974) (Open beach).

In *Katz*, FBI agents attached electronic recording devices to the outside of a public telephone booth from which Defendant placed his calls. The Defendant claimed that the bugging violated his Fourth Amendment rights. *Id.* at 348-349. Both the government and the Defendant submitted lists of "protected areas" for the Court's consideration of whether the Fourth Amendment could be applied to a telephone booth. *Id.* at 351 n.8. This Court, however, rejected the arguments of both parties stating that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected areas.'" *Id.* at 350. "... We have never suggested that this concept can serve as a talismanic to every Fourth Amendment problem." *Id.* at 351 n.9.

This Court rejected the government's contention that the agents' activities should not be tested by the Fourth Amendment because the surveillance technique used by the FBI agents involved no physical penetration of the telephone booth from which the Defendant made his calls. The Court stated:

It is true that the absence of physical penetration was at one time thought to foreclose further Fourth Amendment inquiry *Olmstead v. United States*,² (Citation omitted) "... but [t]he premise that property interest control the right of government to search and seize has been discredited." *Warden v. Hayden*, 387 U.S. 294, 304.

Katz v. United States, 389 U.S. 347, 352, 353 (1967).

In departing from the narrow view expressed in *Olmstead*, this Court held that the government's conduct violated the privacy upon which the Defendant justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. *Id.* at 359.

Justice Harlan suggested in his concurrence in *Katz*, a two-prong test to determine whether Fourth Amendment protection applies to a particular case; this two-prong test has recently been upheld by this Court in the case of *Smith v. Maryland*, 442 U.S. 735 (1979). The inquiry is as follows: First, whether the individual has exhibited an actual (subjective) expectation of privacy; and second, whether this expectation is one that society is prepared to recognize as "reasonable," *Katz*, 389 U.S. 347 (1967); *Smith v. Maryland*, 442 U.S. 735 (1979).

The open fields-curtilage distinction, therefore, is only useful in analyzing the scope of "constitutionally protected areas" and is not dispositive in determining whether a "reasonable expectation of privacy" exists. In the present case, it must be re-emphasized that the area searched was not even an open field.

Although it is quite clear that *Katz* did not overrule *Hester*, it must be argued that it did undermine any *per se* interpretation of the "open fields" doctrine by dispensing with the notion of a "constitutionally protected area" and by substituting a "reasonable expectation of privacy" analysis.⁶ This is the analysis which the Maine Supreme Judicial Court correctly adopted in the present case.

⁶ See *United States v. Lace*, 669 F.2d 46, 55 (2d Cir. 1982) (Newman Jay concurring) (If *Hester* means Fourth Amendment does not extend beyond house, then its validity has not survived *Katz*' holding or rationale.); *United States v. Freie*, 545 F.2d 1217, 1223 (*Hester* no longer has independent meaning.); *United States v. Mullinax*, 508 F. Supp. 512, 514 (E.D. Ky. 1980) (Open fields not *per se* outside Fourth Amendment protection, but Defendants' expectation of privacy must be considered reasonable by society.); *State v. Weigand*, 289 S.E.2d 508, 510 (W.Va. 1982) (Cases generally hold "open fields" doctrine must consider "whether area bore indicia of expectation of privacy" (Citations omitted)).

Because Justice Harlan cited *Hester* in his concurrence in *Katz* stating that:

An enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy.

Id. at 360.

and because he noted further that:

Conversations in the open would not be protected against being overheard for the expectation of privacy under the circumstances would be unreasonable.

Id. at 361.

some courts have focused on these two citations as well as other Supreme Court citations noting that *Hester* has not been overruled for supporting decisions which utilize the *Hester* "open fields" doctrine as a *per se* exception to the Fourth Amendment. However, as stated earlier, *Katz* rejected *Olmstead's* contribution to the doctrine that the area beyond the curtilage was not a "constitutionally protected area," holding that whenever there is a reasonable expectation of privacy, the Fourth Amendment protections are invoked. Therefore, if there is such an expectation of privacy in an area beyond the curtilage, these protections should apply, and they, of course, should apply in the present case.⁷

Even in the recent case of *United States v. Ross*, 102 S. Ct. 2157 (1982), this Court cited with approval the principles set forth in *United States v. Chadwick*, 393 F.Supp. 763, 772 (D. Mass. 1975), where the government errone-

⁷ The Maine Court has never ruled on the issue of whether or not the area searched was beyond the curtilage of Respondent Thornton's residence.

ously contended that the warrant requirement applied only to searches of homes and other "core" areas of privacy:

Writing for the *Chadwick* Court, the CHIEF JUSTICE stated:

'[I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America. Thus, silence in historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of Respondent's footlocker. What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.' 433 U.S., at 8-9, 97 Sup. Ct., at 2481-2482 (footnote omitted).

U.S. v. Ross, 102 S. Ct. at 2165.

In addition, it must be noted that in *Hester* the Defendants were in the "open." There was no mention in the Court opinion of any attempts to exclude the public; there were apparently no fences, no signs, and no significant attempts at concealment. The Court's noticeable failure to mention any such attempts implies that no attempts to exclude the public existed. A person in this situation could be determined to be "in the open," and, therefore, not to have a reasonable expectation of privacy. Therefore, the two terms are complementary. When a person has an actual and reasonable expectation of privacy in an area, then by definition, that area is no longer in the open.

If he does not have a reasonable expectation of privacy in the area, then it is in the open with regard to his Fourth Amendment protections, and *Hester* may apply. Thus, *Katz*, in effect, recognizes that *Hester* applies only when an area is literally open, and the Defendant has no expectation of privacy in it. See J. Glickman *Katz in Open Fields*, 20 Amer. Cr. L. Rev. 493 (1983).

In the present case, there were signs, fences and attempts at concealment, and both the Maine Superior and Supreme Judicial Courts held that Thornton's property was not in the open, and that he made attempts to conceal his property.

The Courts that have held that there can never be a reasonable expectation of privacy in an open field, even when there are substantial efforts to exclude the public, have based their conclusion on the *very nature* of an open field, its openness and usual expansiveness. See *Giddens v. State*, Ga. App., 274 S.E.2d 595, 596 (1980). In the present case, the area searched again was not an open field. The area was a "heavily wooded area" and in no sense could it literally be open. *Thornton*, 453 A.2d at 494, 495; Pet. App. A18, A19, A22, A23. Furthermore, although not applicable to the present case, the nature of the open field should not be dispositive; however, because although privacy may not always be expected in an open field, the nature of the field may be altered in a manner which gives rise to a constitutionally protected privacy interest. The precautions that a person takes in insuring privacy should not be ignored. The *Katz* Court stated:

"What [a person] seeks to preserve as private, even an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. at 351-352 (1967).

Respondent is not alone in his belief that the "open fields" exception to the warrant requirement can no longer be automatically invoked to validate a warrantless search and seizure which takes place outside the curtilage: *United States v. Williams*, 581 F.2d 451, 454 (5th Cir. 1979), *cert. denied*, 448 U.S. 972 (1979), (the court stated that a property owner has a reasonable expectation of privacy in an outbuilding encompassed by a fence which might or might not include the residence); *United States v. DeBacker*, 493 F.Supp. 1078, 1081 (W.D. Mich. 1980) ("Katz compels a more sensitive reading of the Fourth Amendment . . . Instead of declaring entire areas as outside of Fourth Amendment protection, I believe *Katz* compels an analysis of the particular type of surveillance, and its effect on the privacy and security of citizens."); *State v. Lakin*, 588 S.W.2d 544, 549 (Tenn. 1979) (It is not unreasonable to require a police officer to obtain a warrant from an impartial magistrate prior to a search of an open field where marijuana is allegedly growing); *State v. Wert*, 550 S.W.2d 1,3 (Tenn. Crim. 1977) (50-acre farm which was enclosed by a fence is protected from a warrantless search); *Florida v. Brady*, 406 So.2d 1093 (Fla. 1981), *cert. granted*, 102 S.Ct. 2266 (1982) (there is a reasonable expectation of privacy in a 1,800-acre tract of land which is fenced, locked, occupied, and posted); *Burkholder v. Superior Court*, 96 Cal.App.3d 421, 158 Cal.Rptr. 86, 91 (1979) (an individual has a subjective expectation of privacy which is objectively reasonable in a partially fenced-in field).

Cases cited by Petitioner from other jurisdictions where Defendants did not have a reasonable expectation of privacy, or where the "open fields" doctrine applied are distinguishable from the present case. In a number of cases cited by Petitioner, the Defendant did not have an ownership interest or was not in possession of the area

searched, and in other cases there was no dwelling in the entire area; *U.S. v. Hare*, 589 F.2d 242 (5th Cir. 1979) (no expectation of privacy in an open, unfenced, unposted area near highway and apparently no ownership interest in land); *Sesson v. State*, 563 S.W.2d 799 (Tenn. 1978) (no evidence that Defendant owned or was in lawful possession of property); *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981) (individual has no legitimate expectation of privacy in open field in which there is no personal ownership or possessory rights); *Giddens v. State*, Ga. App. 274 S.E.2d 595 (1980), *cert. denied*, 450 U.S. 1026 (1981) (no reasonable expectation of privacy in field where there was no evidence of personal belongings as dwelling to show such privacy expectation, Defendant's expectation of privacy not reasonable); *Ford v. State*, 264 Ark. 141, 569 S.W.2d 105 (1978), *cert. denied*, 441 U.S. 947 (1979) (open field doctrine applied where no building was located on the entire property).

In some of the above and other cases cited by Petitioner, the area searched was, in fact, a "field." *U.S. v. Williams*, 581 F.2d 451 (5th Cir. 1978); *U.S. ex rel. Saiken v. Bensinger*, 546 F.2d 1292 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977), *Ford v. State*, 264 Ark. 141, 569 S.W.2d 105 (1978) *cert. denied*, 441 U.S. 947 (1979), *Giddens v. State*, Ga. App. 274 S.E.2d 595 (1980), *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981), *Commonwealth v. Janek*, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976), *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975).

In *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), this Court cited *Hester* while referring to the "open fields" doctrine and held that a warrantless search was proper. In *Air Pollution Variance Board*, a health inspector trespassed on De-

fendant's outdoor business premises to conduct a pollution test of smoke emissions, *Id.* at 862-863. This Court found it significant, however, that what the inspector saw was visible to the public and that it had not been shown that the inspector was on premises from which the public had been excluded. *Id.* at 865. In the present case, however, the area where marijuana was allegedly found was not visible much less accessible to the public, and Respondent had excluded the public from his land; therefore, this case must be distinguished from *Air Pollution Variance Board, Thornton*, 453 A.2d at 491; Pet. App. A3, A4; J.A. 94, 95, 62, and 65.

In *Harris v. United States*, 390 U.S. 234 (1968), *Hester* is cited for the proposition that "objects falling in the plain view of an officer who has a right to be in a position to have that view are subject to seizure." *Id.* at 236. It is significant to note that in both *Air Pollution Variance Board* and *Harris* above, *Hester's* applicability was to instances in which the officers were *legitimately* on the premises. Also in *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), *Hester* is cited as supporting the proposition that where there is no invasion of privacy, there is no unconstitutional search. (*Id.* at 352.) Therefore, the Supreme Judicial Court of Maine, holding that the legitimacy of the officers' presence should be examined for the applicability of the "open fields" doctrine, is consistent with this Court's holding in that area.

This Court has also upheld *Coolidge v. New Hampshire*, 40 U.S. 443 (1971) where the legitimacy of the officer's position is examined for the application of the "plain view" doctrine, *Texas v. Clifford James Brown*, 51 U.S.L.W. 4361, (No. 81-419), decided April 19, 1983.

Petitioner's reliance on cases where areas were observed by aerial surveillance misses the threshold ques-

tion. It is the government's burden of proof to show that the observations were, in fact, made that way without violating Respondent's expectation of privacy. The facts in the present case, of course, do not indicate that aerial surveillance was involved. Even if one were to assume that the forms of aerial surveillance relied upon by Petitioner were constitutional, the ground searches used in the present case are still illegal.

The reasoning Petitioner uses regarding aerial searches is unfounded. It is true that the possibility of aerial surveillance may preclude complete privacy in any area. Complete privacy, however, cannot be compared with a reasonable expectation of privacy. A person's physical inability to complete privacy in all circumstances and in all areas does not prevent a reasonable expectation of privacy. The expectation need only be reasonable; it need not be unassailable. See J. Glickman, *Katz in Open Fields*, 20 Amer. Crim. L. Rev. 494 (1983).

Reasonable expectations of privacy have been found in many locations that could not be totally secured against all forms of surveillance. In *Katz*, the Defendant had a reasonable expectation of privacy in the phone booth, even though it was not secured against electronic surveillance. Since *Katz* was not required to make this phone call in a surveillance-proof booth, the owners of property should not be required to construct opaque bubbles over their land. See *United States v. Allen*, 675 F.2d at 1373, 1380 (1980).*

* In the brief of Amici Curiae submitted by the American Civil Liberties Union of Northern California, Mexican-American Legal Defense in Educational Fund and California Rural Legal Assistance

- B. The Maine Supreme Juducial Court ruled correctly in holding that respondent Thornton had a reasonable expectation of privacy in the area searched in his rural and posted woods surrounding the alleged secluded marijuana patches.

Petitioner contends that Respondent Thornton could not have had a reasonable expectation of privacy in the area searched because the Court's prerequisite for determining whether the "open fields" doctrine applied was incorrect:

1. The openness with which the activities pursued; and
2. The lawfulness of the officers' presence during their observation of what is open and patent.

Petitioner's analysis of whether the "open fields" doctrine applies in the present case can be dispensed with

in support of the Petitioner in *United States v. Oliver*, 686 F.2d 356 (6th Cir. 1982), Amici Curiae stated as follows:

The government asserts that aerial searches are constitutional, and that the farmer must have a diminished expectation of privacy with respect to *ground* searches . . .

* * *

This reasoning is exactly backwards. At times, interpretation of the Fourth Amendment has lagged behind the newer technologies of surveillance, compare *Olmstead* with *Katz*, and thus newer methods of invading privacy were temporarily not perceived as "searches" or "seizures" . . . but the Court has never seen these newer technologies as an excuse for abandoning *established* safeguards . . . the prohibition of warrantless searches on private property has always been at the very core of the Fourth Amendment. The government's approach, however, instead of expanding the amendments reached to meet the times, would abandon even the established core of safeguards as no longer suitable . . .

(Amici Curiae, Br. 40).

from previous discussions of that theory in this brief. The fact that Respondent had a reasonable expectation of privacy has also been discussed. However, Petitioner misconstrues the Maine Supreme Judicial Court's definition of "reasonable expectation of privacy." Such a definition does not include only whether there was a *subjective* expectation of privacy, but in all Maine cases where there is a "reasonable expectation of privacy," there has been a reasonableness or objectivity test, and such analysis took place in the present case. In case of the *State v. Peakes*, 440 A.2d 350 (1982), which Petitioner incorrectly relied upon in its brief to the Maine Supreme Judicial Court for its contention that Thornton did not have a reasonable expectation of privacy, the Maine Supreme Judicial Court noted that "the Defendant correctly notes that his garden was not open or exposed to the public," this requirement of openness was not enough for the Maine Court because the Court stated "but the Defendant made no attempt to conceal the garden from the view of his neighbors. He cannot be said to have had an *actual* expectation of privacy in the garden under these circumstances." *Id.* at 352. (Emphasis Supplied.)

Petitioner does not distinguish between whether:

1. Respondent had an expectation of privacy in the area searched which was reasonable; and,
2. Whether the conduct of the police in searching the property is unreasonable.

The Court in the present case clearly found that Respondent's subjective expectation of privacy was one that society was prepared to recognize as reasonable in that it cited many cases arising in Maine where the two-fold test was explained. See *United States v. Taylor*, 515 F.Supp. 1321 (1981), where the Court stated "in order to merit

constitutional production, an individual's subjective expectation of privacy must be one that society is prepared to recognize as reasonable." *Id.* at 1326.

In *United States v. Hensel*, 509 F.Supp. 1364 (D. Me. 1981), the Court stated that the Defendant's subjective expectation of privacy was not controlling, but rather his expectation of privacy must be objectively reasonable.

Turning to the reasonableness of the police conduct in the present case, the Court was correct in examining the officers' position of observation and the openness of the conduct. The Respondent would not be afforded the constitutional protection if his activity was open, patent, or knowingly exposed to public. The Maine Supreme Judicial Court cited various Maine cases in the *Thornton* decision, analyzing a determination of openness. Further, the Court's examination of the legitimacy of the officers' presence on the Respondent's property is also completely in accord with cases in Maine and other jurisdictions. If the police were legitimately on the premises, in some situations, even though there was a subjective expectation of privacy, that expectation of privacy would not be objectively reasonable. Such examples were cited by the Maine Supreme Judicial Court in its opinion in *Thornton* as follows:

The *State v. Peakes*, 440 A.2d at 353

"The officers observed something which was "open and patent" to the Defendant's neighbors and their invitees," and such observation was made on neighboring land.

The *State v. Dow*, 392 A.2d at 535,

"[T]he warden who apparently had as much right to be in a parking lot as Defendants, merely observes that which was completely open to public . . ."

The testimony at the suppression hearing was overwhelming regarding the Respondent's expectation of privacy in the area searched. There were twelve exhibits showing by photograph the remoteness of the area searched, including the "garden spots" and Linda Thornton (Respondent's wife) testified extensively regarding their expectation of privacy. Even the police testified as to the remoteness of the area searched. However, Petitioner argues that because the activity was conducted outdoors in a secluded location, that any expectation of privacy is not objectively reasonable. Petitioner's rationale, again, is a throwback to the *Olmstead* protected area analysis, and is further contradicted by cases in Maine and other jurisdictions.

The problem with Petitioner's theory is that it is too restrictive. The Maine Supreme Judicial Court not only looked at whether the activity was conducted outdoors, it examined whether the activity was open, patent and exposed to the public, which, of course, it was not.

Petitioner incorrectly states that the "patches themselves were located about 500 feet from the Thornton house." (Br. 51). Linda Thornton testified that the area searched was approximately 250 feet from the driveway. Since the Thornton residence was between the "patches" and the driveway, it would be impossible for the patches to be located 500 feet from the residence (J.A. 45, 46, 47). It was also never established that the officers "never came near the house." (Br. 51).

Petitioner misconstrues the cases in Maine and elsewhere regarding the burden of proof. It is also significant to note that this issue was never raised to the Maine Supreme Judicial Court by Petitioner. It has always been the law of this state that warrantless searches are, *per se*, unreasonable subject to a view specifically established,

carefully drawn and much guarded exceptions, and the burden is on the state to prove, by fair preponderance of the evidence, the underlying facts bringing the case within one of the exceptions. See *State v. Philbrick*, 436 A.2d 844 (Me. 1981).

Petitioner further erroneously goes on to state that the burden of proof was on the state to show that Thornton's expectation of privacy in his woods was unreasonable. This was never the case and even if it were, it is clear by the testimony of all of the individuals at the suppression hearing and the numerous exhibits introduced at said hearing that the burden of showing that Thornton had an expectation of privacy was clearly met.

Petitioner misconstrues the burden of proof in this case with a "standing" analysis. The burden of proof to establish *standing* to challenge the search and seizure is in fact on the Defendant; to have actual standing, the Defendant must establish a legitimate and reasonable expectation of privacy in the premises searched *or the property seized*. *U.S. v. Balsamo*, 468 F.Supp. 1368 (D. Me. 1979). *State v. Dunlap*, 395 A.2d 821 (Me. 1978).

The brief for Amici Curiae filed by the State of Alabama, and joined by Alaska, American-Samoa, Arizona, Colorado, Delaware, Kansas, Kentucky, Nebraska, Utah, Vermont, West Virginia, Wisconsin and Wyoming is not applicable to the present case because the question presented in its brief is not the same question presented to the Supreme Court in *State v. Thornton*. Amici Curiae presented the following question:

"Does the Fourth Amendment extend to open fields which are fenced and posted with No Trespassing signs?"

In the present case, the Maine Supreme Judicial Court held that the "open fields" doctrine was inapplicable,

therefore, the question presented has no relevance. Further, Amici Curiae states at pages 4 and 5 of its brief that "the issue in this case is whether *Hester*, above, was overruled by *Katz v. United States* (citation omitted). That, of course, is not the issue in this case.

Amici Curiae's first argument that open land, even if privately owned is never private, again does not address the issue in this case. Rather, the argument applies to fish and game laws and the "open land" discussed by Amici Curiae is not the same as the area searched in the present case. It does not follow that because insects and wildlife go onto private land, police can go on private property and make searches without a search warrant.

Amici Curiae's argument that police should be able to indiscriminately go on individual's privately owned land to search aimlessly for trespassers (Amici Curiae Br. at 19) does not even make logical sense nor is such a theory supported by any case law.

III. Petitioner Raised Additional Questions And Changed The Substance Of The Question Presented In Its Petition For Writ Of Certiorari And In Its Appeal To The Maine Supreme Judicial Court.

Rule 34 of the Rules of the Supreme Court of the United States appears in pertinent part as follows . . .

"The phrasing of the questions presented need not be the identical with that set forth in the jurisdictional statement or the petition for certiorari, *but the brief may not raise additional questions or change the substance of questions already presented in those documents . . .*" (Emphasis Supplied).

Petitioner's brief essentially discusses one theory; whether in terms of *Katz*, *Hester* represents a *per se* rule that any subjective expectation of privacy in open fields or wooded areas is unreasonable. This theory was never

raised by Petitioner in its arguments to the Maine courts or in its Petition for Writ of Certiorari. The State now urges the creation of a new *per se* exception to the warrant requirement to cover this case. It is too late to raise this issue, as it was not raised in either Petitioner's Writ of Certiorari or in its appeal to the Maine Supreme Judicial Court.

CONCLUSION

Respondent Thornton urges this Court to affirm the Judgment of the Maine Supreme Judicial Court and to allow this State to develop its own law regarding warrantless search and seizures as such developing law is not in conflict with cases decided by this Court. For the Maine Supreme Judicial Court to apply a reasonable expectation of privacy analysis to the present cases is clearly not erroneous. Noting that the "open fields" doctrine was still viable in Maine, the Maine Supreme Judicial Court did nothing to the *Hester* doctrine except to say that it did not apply to this case. A State court should be free to make that determination.

If this Supreme Court reverses this case, then the *Hester* doctrine will be broadened and will replace the *Katz* doctrine in this case, and the issue of what constitutes a constitutionally protected area will be reincar-

nated. Therefore, pursuant to the foregoing argument, the Judgment of the Supreme Judicial Court of Maine in *State of Maine v. Richard Thornton*, 453 A.2d 489 (Me. 1982), should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF MAINE, *Petitioner*

v.

RICHARD THORNTON, *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE MAINE SUPREME JUDICIAL COURT'S JUDGMENT IN *STATE V. THORNTON*, 453 A.2d 489 (Me. 1982), DOES NOT REST UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondent urges this Court to dismiss the present case on the ground that the Maine Supreme Judicial Court's judgment in *State v. Thornton*, 453 A.2d 489 (Me. 1982), rests upon "adequate and independent" state grounds. (Brief for Respondent at 12-17). Petitioner addressed this issue in its Brief (Brief for Petitioner at 16 n.5), noting that the Maine Court's decision in *Thornton* is concerned exclusively with the scope of federal Fourth Amendment protection under *Katz v. United States*, 389 U.S. 347 (1967), and does not cite or purport to interpret in any way the state constitutional provision on search and seizure (Me. Const. art. I, § 5). The "plain statement" rule recently articulated in *Michigan v. Long*, 103 S.Ct. 3469, 3476 & n.7 (1983)—about six weeks after the filing of Petitioner's Brief—supports Petitioner's position that this Court should assert jurisdiction in the present case.

In *Michigan v. Long*, this Court set forth a uniform approach for determining whether a state court decision rests upon adequate and independent state grounds:

[W]hen... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain state-

ment in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

....

... [I]n determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, see *Abie State Bank v. Bryan*, *supra*, 282 U.S., at 773, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Michigan v. Long, 103 S.Ct. at 3476-77 (footnote omitted).

Applying this framework to the decision below leads to the conclusion that the Maine Court's opinion does not rest upon an adequate and independent state ground. As mentioned above, *Thornton* constitutes an application of *Katz*'s "reasonable expectation of privacy" test and does not even cite the state constitutional provision on search and seizure (Me. Const. art. I, § 5), nor is there any reference to any state constitutional provision or statute.¹

¹ *Florida v. Casal*, 103 S.Ct. 3100 (1983), discussed by Respondent in support of his position that *Thornton* is based on state law (Brief for Respondent at 14), is distinguishable from the instant case because there the Florida Supreme Court, although not expressly declaring that its holding rested on state grounds, did expressly analyze the legality of the officer's search in light of Florida statutory law—Fla. Stat. § 371.58 (1974) (renumbered at § 327.56 (Supp. 1983)). *State v. Casal*, Fla., 410 So.2d 152 (1982).

Admittedly, statements in *Thornton* that "the suppression justice applied *the law of the State* and found inapplicable the 'open fields' exception to the warrant requirement" and "[i]n *Maine*, for the 'open fields' doctrine to apply, two factual aspects of the circumstances must be considered: (1) the openness with which the activity is pursued,... and (2) the lawfulness of the officers' presence during their observations of what is open and patent...." (*Thornton*, 453 A.2d at 495; Pet. App. A20-A21 (emphasis added)) suggest the possibility that the Maine Court was applying, pursuant to state law, a distinctly Maine version of *Hester*'s "open fields" doctrine (see Brief for Petitioner at 16 n.5). However, these references to "Maine" law do not constitute a plain statement that the *Thornton* decision is in fact based on bona fide separate, adequate, and independent state grounds. Indeed, *Thornton*'s two "Maine" prerequisites for applying the "open fields" doctrine represent an express reconciliation of *Hester* with *Katz*'s "reasonable expectation of privacy" test for applying Fourth Amendment protections. Illustrative of this point are the following sentences in *Thornton* itself:

Although an activity may be observed, because, for example, it is conducted outside, the participants may still have, as in this case, an expectation of privacy. *Katz*, 389 U.S. at 351-52, 88 S.Ct. at 511, 19 L.Ed.2d at 582. Under such circumstances, the State must demonstrate the legitimacy of the officers' position of observation [prerequisite "2"] and the openness of the conduct [prerequisite "1"] in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute a search. In the circumstances of this case, the State can demonstrate neither requirement for the application of the open fields doctrine....

....

Although separated by forty-three years, the *Hes-*

ter doctrine and the *Katz* doctrine can be reconciled; indeed, such reconciliation is required. *Dow*, 392 A. 2d at 536; *State v. Brady*, 379 So.2d 1294, 1295 (Fla. 1980) ("*Katz* did not rule out the open fields of *Hester* altogether"). Under both analyses, the reasonableness of any subjective expectation of privacy would be questioned: "the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out." *Brady*, 379 So.2d at 1295.

453 A.2d at 495-96; Pet. App. A22-A23, A24. Thus, in promulgating and applying its two prerequisites for the application of *Hester*'s "open fields" doctrine the Maine Court was relying on its understanding of *Katz*'s "reasonable expectation of privacy" test. Moreover, the three cases cited in *Thornton* (453 A.2d at 495; Pet. App. A21-A22) as authority for "Maine's" two prerequisites—*State v. Peakes*, 440 A.2d 350 (Me. 1982), *State v. Dow*, 392 A.2d 532 (Me. 1978), and *State v. Stone*, 294 A.2d 683 (Me. 1972)—address the scope of federal Fourth Amendment protection, especially in the wake of *Katz*, and are not based in any way upon the state constitution or any state law (see Brief for Petitioner at 16 n.5). Hence, these three cases do not constitute a separate, adequate, and independent state law ground for the *Thornton* decision.² Furthermore, nowhere in *Thornton* is there a plain

²In *Michigan v. Long*, this Court stated that "we do not wish to continue to decide issues of state law that go beyond the opinion that we review..." (103 S.Ct. at 3476), i.e., that the adequacy and independence of an alleged state law ground should be apparent "from the four corners of the opinion" (103 S.Ct. at 3475). From the face of the *Thornton* decision—without going beyond the opinion to examine *Peakes*, *Dow*, and *Stone*—it is apparent that the Maine Court's two prerequisites for application of the "open fields" doctrine are not based on an independent state source and constitute the Maine Court's solution for reconciling one federal Fourth Amendment doctrine (*Katz*'s "reasonable expectation of privacy" test) with yet another (*Hester*'s "open fields" doctrine). If this Court should decide, however, that the present case is one where Maine case law should be

statement that *Katz* and *Hester* "are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 103 S.Ct. at 3476. Finally, the Maine Court's string-citation of a number of Maine cases on search and seizure does not undermine the conclusion that the *Thornton* decision is based on federal law because all of these Maine cases are expressly cited as being in accord with *Katz* and virtually all are *Katz* progeny. (*Thornton*, 453 A.2d at 493-94; Pet. App. A14-A18). Since the *Thornton* opinion itself does not state that the Maine Court relied upon an adequate and independent state ground and, moreover, appears to rest exclusively on federal law, this Court must decide that it has, and should assert, jurisdiction in this case. *Michigan v. Long*, 103 S.Ct. at 3476-77.

II. IN TERMS OF *KATZ*, *HESTER*'S "OPEN FIELDS" DOCTRINE SHOULD BE A BRIGHT-LINE RULE THAT ANY SUBJECTIVE EXPECTATION OF PRIVACY IN FIELDS OR WOODS—EVEN THOSE THAT ARE FENCED, POSTED, AND SECLUDED—IS UNREASONABLE *PER SE*.

The need for a bright-line rule concerning the applicabil-

examined to determine the adequacy of the alleged state ground of decision (see *Michigan v. Long*, 103 S.Ct. at 3476 & n.6), then such an examination would reveal that *Peakes*, *Dow*, and *Stone* are simply state court interpretations of federal law. Moreover, the remedy employed by the Maine Court in *Thornton*—i.e., the exclusionary rule—is further indication of the federal basis of the *Thornton* decision as the Maine Court has repeatedly stated that under Maine law there is no exclusionary rule for illegal or unreasonable searches and seizures. E.g., *State v. Stone*, 294 A.2d 683, 693 n. 15 (Me. 1972); *State v. Hawkins*, 261 A.2d 255, 258 n.3 (Me. 1970); *State v. Schoppe*, 113 Me. 10, 15, 92 A. 867 (1915); *State v. Burroughs*, 72 Me. 479, 480-81 (1881); see also *State v. Bouchier*, 457 A. 2d 798, 801 n. 4 (Me. 1983); *State v. Patton*, 457 A.2d 806, 811 (Me. 1983).

ity of the "open fields" doctrine of *Hester v. United States*, 265 U.S. 57 (1924), in the wake of *Katz v. United States*, 389 U.S. 347 (1967), is illustrated by both cases now before this Court—*State v. Thornton*, 453 A.2d 489 (Me. 1982) and *United States v. Oliver*, 686 F.2d 356 (6th Cir. 1982)—which present conflicting holdings on nearly identical facts.³ Moreover, since the filing of Petitioner's Brief, this Court has expressed in several Fourth Amendment decisions a preference for search-and-seizure rules that can be applied consistently and predictably by law enforcement officers. *Illinois v. Andreas*, 103 S.Ct. 3319, 3324 (1983); *Illinois v. Lafayette*, 103 S.Ct. 2605, 2610-11 (1983); see *Oregon v. Bradshaw*, 103 S.Ct. 2830, 2837 n.3 (1983) (Powell, J., concurring). Criteria governing the content of such rules were set forth in *Illinois v. Andreas*. The bright-line rule advanced here satisfies these criteria.

In *Andreas*, this Court stated:

In fashioning a standard [controlling the applicability of Fourth Amendment protections], we must be mindful of three Fourth Amendment principles. First, the standard should be workable for application by rank and file, trained police officers. See *New York v. Belton*, 453 U.S. 454, 458-460, 101 S.Ct. 2860,

³Decisions from other jurisdictions reflect this same inconsistency, demonstrating further the need for this Court to decide upon a rule that can be applied uniformly by courts and the police. Compare, e.g., *Ford v. State*, 264 Ark. 141, 569 S.W.2d 105 (1978), cert. denied, 441 U.S. 947 (1979); *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026 (1981); and *Commonwealth v. Janek*, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976) with *State v. Brady*, Fla., 406 So.2d 1093 (1981), cert. granted, 456 U.S. 988 (1982); *State v. Byers*, La., 359 So.2d 84 (1978); *State v. Carter*, 54 Or. App. 852, 636 P.2d 460 (1981); and *State v. Walle*, 52 Or. App. 963, 630 P.2d 377 (1981).

2863-2864, 69 L.Ed.2d 768 (1981); *United States v. Ross*, 456 U.S. 798, 821, 102 S.Ct. 2157, 2170, 72 L.Ed.2d 572 (1982). Second, it should be reasonable; for example, it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed. Third, the standard should be objective, not dependent on the belief of individual police officers. See *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1879-1880, 20 L.Ed.2d 889 (1968).

103 S.Ct. at 3324. Petitioner's proposed bright-line rule, *viz.*, that any subjective expectation of privacy in fields or woods—even those that are fenced, posted, and secluded—is *per se* unreasonable for purposes of Fourth Amendment protection, is faithful to all three of these principles. First, the bright-line rule is workable because it can be applied quickly, easily, and with certainty by law enforcement officers whenever a search for evidence of criminal activity takes them into fields or woods. Second, the rule is reasonable because fields and woods are not places where human relations or activities demanding or creating the need for privacy ordinarily take place.⁴ See Brief for Petitioner at 32-41.⁵ And third, the rule is objective because its application does not

⁴Respondent's contention that his woods cannot be equated with fields for purposes of *Hester*'s "open fields" doctrine (Brief for Respondent at 24-26) misses the point that under *Katz* any subjective expectation of privacy in either place is unreasonable for purposes of Fourth Amendment protection. See Brief for Petitioner at 38 n.12.

⁵Citing footnote 12 in *Rakas v. Illinois*, 439 U.S. 128, 144 (1978), Respondent contends that a property owner's right to exclude others is sufficient in itself to render legitimate a subjective privacy expectation in fields or woods. (Brief for Respondent at 20). In that same footnote this Court

depend upon the subjective evaluation by individual police officers as to whether a landowner's particular kind of fencing or posting has somehow conferred "reasonableness" for Fourth Amendment purposes on his subjective expectation of privacy.

No other alternative to the bright-line rule advanced here results in a workable, objective application of *Katz*'s "reasonable expectation of privacy" test to fields or woods. Any other alternative, even the "reasonable suspicion" standard posed by the United States in its Brief in *Oliver v. United States* (Brief for Respondent at 30-39, *Oliver v. United States*, No. 82-15), requires the police to engage in what can become fine and subtle subjective evaluations as to whether any particular kind of fencing, posting, or other exclusionary measure is substantial enough to bring the area within the protection of the Fourth Amendment.

III. PETITIONER'S BRIEF ON THE MERITS NEITHER CHANGES THE SUBSTANCE OF THE QUESTION PRESENTED FOR REVIEW IN THE PETITION FOR CERTIORARI NOR RAISES ADDITIONAL QUESTIONS.

Respondent contends that Petitioner's Brief does not comply with U.S. Sup. Ct. Rule 34.1(a) on the ground that Pe-

stated, however, that "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon. See ... *Hester v. United States*, 265 U.S. 57, 58-59 (1924)." Moreover, Respondent's contention here was raised in analogous form by *Hester* (Brief for Plaintiff at 4-5, 6-7, *Hester v. United States*, 265 U.S. 57 (1924)) and rejected by this Court. *Hester*, 265 U.S. at 58-59.

itioner's discussion of a bright-line rule changes the substance of the question presented for review in the petition for certiorari and raises additional questions. (Brief for Respondent at 45-46). The contention is without merit since the bright-line rule is proffered as the most desirable answer to the question presented in the petition, *viz.*, whether *Hester's* "open fields" doctrine is applicable to the instant case.

Respondent's additional contention that "[i]t is too late" for Petitioner to advance its *per se* rule "as it was not raised ... in its appeal to the Maine Supreme Judicial Court" (Brief for Respondent at 45-46) is irrelevant since the critical fact is that the issue presented in the petition—to which the *per se* rule is Petitioner's answer—was also presented to and decided against Petitioner by the Maine Supreme Judicial Court. *Thornton*, 453 A.2d at 493-96; Pet. App All-A26; *cf. Illinois v. Gates*, 103 S.Ct. 2317, 2320-25 (1983) (issue of whether there should be a "good faith" exception to the exclusionary rule not decided since neither presented to nor decided by the state courts below). The mere fact that Petitioner did not argue for the bright-line rule, as such, in the Maine courts does not preclude Petitioner from now advancing the rule in this Court as "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Illinois v. Gates*, 103 S.Ct. at 2322 (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)).

CONCLUSION

The judgment of the Supreme Judicial Court of Maine in *State of Maine v. Richard Thornton*, 453 A.2d 489 (Me. 1982), should be reversed.

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NO. 82-1273

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MAINE, PETITIONER

VS.

RICHARD THORNTON, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MAINE

BRIEF AND ARGUMENT OF AMICI CURIAE,
STATE OF ALABAMA, JOINED BY ALASKA,
AMERICAN SAMOA, ARIZONA, COLORADO,
DELAWARE, KANSAS, KENTUCKY, NEBRASKA,
UTAH, VERMONT, WEST VIRGINIA,
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QUESTION PRESENTED

Does the Fourth Amendment extend to open fields which are fenced and posted with no trespassing signs?

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BRIEF AND ARGUMENT OF AMICI CURIAE,
STATE OF ALABAMA, ET AL.

THE AMICI CURIAE

This brief and argument is submitted
by the State of Alabama and joined by the
following states and territories:

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Arizona	Robert K. Corbin Attorney General

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THE INTEREST OF THE AMICI CURIAE

Each of the listed states, by and through their attorneys general, respectfully offers this brief in support of the Petitioner, the State of Maine. The Amici will all be affected by the decision in this case, because, in addition to general law enforcement considerations, each of these states has laws, such as those relating to the protection of public health, wild game, timber and the environment and those against trespass, the effective enforcement of which depends on public

officers being able to enter open land regularly to check conditions.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States, which reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

SUMMARY OF THE ARGUMENT

Since 1924 this Honorable Court has expressly treated open fields as being beyond the scope of the Fourth Amendment. Hester v. United States, 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924) The

issue in this case is whether Hester, above, was overruled by Katz v. United States, (389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 [1967])). Yet, the cases since Katz adhere to and may even have expanded Hester. E.g. Air Pollution Variance Board v. Western Alfalfa Corp. 416 U.S. 861, 40 L. Ed. 607, 94 S. Ct. 2114 (1974); United States v. Santana, 427 U.S. 38, 49 L. Ed. 2d 300, 96 S. Ct. 2406 (1976); G. M. Leasing Corp. v. United States, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977) This brief will address the effect on a wide public of an overruling of Hester.

I. Because of their closed nature, buildings are essentially private. The Fourth Amendment is designed to protect this privacy. Open land, even if it is privately owned and fenced, is not private. The elements, wild animals and

insects move about open land without regard for land lines or fences. Land is a natural resource and contains natural resources. While an owner has an interest in his land, the public has an equally undeniable interest in all open land. The public interest in open land was well established at the time the Fourth Amendment was drafted, and, for this reason, open land was excluded from the Amendment's shield. Compare Camera v. Municipal Court, (387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 [1967]) and See v. Seattle, (387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 [1967]) with Air Pollution Variance Board v. Western Alfalfa, above. The protection of vital public interests in land, soil, water, air, timber, wild life and public health requires that officials enter open land,

not because they have reason to believe that problems exist but to detect problems in time to minimize their impact. For these reasons, the Fourth Amendment should not be expanded beyond its language and traditional limits.

II. When a land owner fences and posts his property, he does so in an effort to envoke the protection of the trespass laws. For the trespass laws to give practical protection to land owners, they must be enforced by police officers' going onto the land to discover, arrest and remove trespassers. Yet, under the Maine Court's interpretation of the Fourth Amendment, the acts by which the law abiding land owner seeks to envoke the protection of the trespass laws would exclude from the land the officers charged with enforcing these laws. This is a boon to those who use

their land for unlawful purposes but a loss of valuable protection to law abiding land owners. This interpretation of the Fourth Amendment must be rejected.

ARGUMENT

In Hester v. United States, (265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 [1924]) this Honorable Court held that the Fourth Amendment did not apply to "open fields". Hester established the open fields doctrine which holds that real property which is beyond the curtilage of a home or business is beyond the scope of the Fourth Amendment. The issue in this case is whether Katz v. United States, (389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 [1967]) overruled Hester. It is interesting to note that if Katz did indeed overrule Hester no

one, apparently including the Honorable Justices who rendered Katz, seems to have noticed it until rather recently. In fact, this Honorable Court's decisions on the open fields doctrine since Katz seem to indicate an abandonment of the distinction between the curtilage and other open areas. See, for example, Air Pollution Variance Board v. Western Alfalfa Corp., (416 U.S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 [1974]),¹ United States v. Santana, (427 U.S. 38, 49 L. Ed. 2d 300, 96 S. Ct. 2406 [1976])², G.M. Leasing Corp. v. United States, (429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 [1977]).³

¹Plant premises outside of buildings. Hester relied on and cited at 416. U.S. 861, 865.

²The doorway of a home. Hester and Katz both cited at 427 U.S. 38, 42, 49 L. Ed. 2d 300, 305.

³Open areas. Hester cited at 429 U.S. 338, 352, 50 L. Ed. 2d 530, 543.

The instant case raises the question of whether government officials may enter land which is fenced and posted against trespassers without a search warrant or probable cause and exigent circumstances. In this brief the Amici states and territories will seek to present some of the "...effects on a wider public..."⁴ of an overruling of Hester.

I.

THE EFFECT ON THE INTERESTS OF
THE GENERAL PUBLIC IN OPEN
LAND

The immediate effect of the interpretation placed on the Fourth Amendment by the Honorable Supreme

⁴"...[C]haracteristic of adjudication is the tendency to concentrate on the immediate case at hand while paying less heed to the effects on a wider public...." "A Flawed System" by Derek C. Bok, Harvard Magazine, May-June, 1983, p. 38 at 42.

Judicial Court of Maine is to authorize owners of rural land to exclude from their land public officers, unless the officers have probable cause and either a warrant or exigent circumstances. This will naturally "balkanize" rural land as some owners indicate an expectation of privacy and others do not. Game wardens, foresters, environmentalists, and public health officials will be free to inspect this patch of land and that patch of land, but not the one in between, unless they have a warrant. This will make the protection of the public's interests in open land subject to the whim of individual owners.

There are fundamental differences between buildings and open areas, especially rural land. The purpose of a building is to enclose and exclude; the persons and property inside a building

are enclosed, while the elements, insects, wild animals and the public are excluded. What goes on inside a private building is primarily the concern of the owners or occupants and not the public. This is true of any building, whether it be a home, a business, a storage shed or a telephone booth.⁵ If the public has a concern inside a private building, it may indeed enter the building to pursue the public interest. However, before the public enters a private building, our most fundamental public interests in personal freedom and human rights as embodied in the Fourth Amendment, require that the public have reason to believe that the building contains matters of public concern and, if possible, that the reason be presented to a neutral

⁵E.g. Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)

magistrate. Open land may be set off by a fence, but a fence cannot enclose nor exclude the elements, insects nor wild animals. As for the public, there are few people who have spent any time in rural areas who are not experienced in fence climbing. In addition, unlike a building, vehicle, container or other artifact, open land is a natural resource and usually contains other resources in the form of timber, game, fish, soil, water and minerals. While the owner unquestionably has an interest in his land, the public has an equally undeniable interest in the land and the timber, wildlife, water, soil and minerals found on the land. These are not new concepts, although recent population increases and resource depletions have made them more pressing.

These concepts were already ancient when the Fourth Amendment was drafted, which explains why open land was excluded from the Amendment's shield. Compare Camera v. Municipal Court, (387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 [1967]), forbidding warrantless searches of private residences by a building inspector and See v. Seattle, (387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 [1967]), reaching the same conclusion with regard to a commercial warehouse, with Air Pollution Variance Board v. Western Alfalfa Corp., (416 U.S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 [1974]) upholding a warrantless entry onto business premises outside of buildings by an air pollution inspector.

The problem with applying the Fourth Amendment to open land is not the warrant requirement but the probable cause

requirement. Officials who are charged with protecting wildlife, the environment and public health, seldom enter a particular portion of land because they suspect that there is a problem. Usually, by the time a problem becomes noticable to any but a well trained observer, it is extremely serious. Game wardens must act before a species becomes endangered. The condition of the soil, water and air must be monitered before fish, birds and people start dying or farm land is stripped of its top soil. These public interests can only be protected by random spot checks of open land by trained experts. By the time dangerous conditions on posted land become detectable on unposted land, disaster may be unavoidable. An insect

infestation which could have been controlled by the destruction of a single tree, can infect millions of acres of timber land within a few months. Having asserted his expectation of privacy, a land owner could tip the balance toward the extinction of a species long before conservation officers had any articulatable reason to believe that illegal hunting, fishing, or trapping was in progress. A few rabid squirrels on posted land could produce an epidemic by the time diseased animals were noticed on non-posted land.

These concerns for the world's land, soil, trees and wild life transcend not only land lines but international boundaries as well. See, for example, Missouri v. Holland, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920) The Fourth Amendment protects private interests in

places which are capable of being private. Open land, even if owed privately, is not private. It is open to the world, and the public interests in it are at least as great as those of the owner. Open land is occupied by wild animals which are "owned"⁶ by the public, and covered with trees, crossed by water and air, and contains soil and minerals in which the public has vital interests. For all of these reasons, the Fourth Amendment ought not be expanded beyond its language and traditional limits.

II.

THE EFFECT ON LAW ABIDING LAND OWNERS.

The Fourth Amendment Exclusionary Rule has often been criticized for the protection it gives to criminals. The

⁶35 Am Jur. 2d, Fish and Game, Section 1.

response to this criticism is that, while the rule may protect criminals, it also protects the innocent. However, in the instant case, the Maine Court seems to have succeeded in creating a rule which not only protects those who engage in unlawful activities on their land but which at the same time strips law abiding land owners of the protection of the trespass laws.

A land owner who fences his property and erects "no trespass" signs does so in an effort to evoke his rights under the trespass laws. The problem is that fences can be climbed and signs disregarded, and the persons most likely to do these things will be, by and large, the very people the land owner would most like to exclude. For protection against these persons the land owner must count

on the police to arrest or at least remove trespassers from his land. But, how is an officer going to discover trespassers without entering the land from time to time? However, under the interpretation of the Fourth Amendment embraced by the Honorable Supreme Judicial Court of Maine, an officer could not do this, if the land were fenced and posted against trespassers. In other words, the honest land owner's fencing and posting his land in an effort to protect himself from trespassers would prevent officers from going onto the land to enforce the trespass laws. A rule such as this is a great boon to marijuana growers, illegal waste dumpers and others who use open land for unlawful purposes, but it will greatly reduce the protection now afforded to law-abiding citizens.

The Fourth Amendment may sometimes protect the lawless but it was never the Amendment's purpose to aggrandize the interests of the lawless over those of the law abiding. If this result is to be avoided, the interpretation placed on the Fourth Amendment by the Honorable Supreme Judicial Court of Maine must be rejected.

CONCLUSION

In conclusion the Amici respectfully submit that extending the Fourth Amendment beyond its traditional limits to open fields would severely limit the ability of the states, territories and the federal government to protect vital public interests in open land and to enforce the trespass laws for the benefit of law abiding land owners. Therefore,

the Amici respectfully urge this Honorable Court to uphold the Fourth Amendment in accordance with its plain words, as protecting, "The right of the people to be secure in their persons, houses, papers, and effects..." but not extending to open fields.

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ATTORNEYS FOR AMICI CURIAE

ADDRESS OF COUNSEL:

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama and the other Amici Curiae States and territories, do hereby certify that on this 16th day of May, 1983, I did serve the requisite number of copies of the foregoing on the Attorneys for the State of Maine, Petitioner, and Richard Thornton, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Honorable James E. Tierney
Attorney General
State of Maine
Office of the Attorney General
State House Station 6
Augusta, Maine 04333

Honorable Wayne S. Moss
Assistant Attorney General
State of Maine
Office of the Attorney General
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State House Station 6
Augusta, Maine 04333

Honorable Donna L. Zeegers
Attorney at Law
P. O. Box 2709
1 Community Drive
Augusta, Maine 04330

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No. 82-1273-CSY
Status: GRANTED

Title: Maine, Petitioner
v.
Richard Thornton

Docketed:
January 31, 1983

Court: Supreme Judicial Court of Maine

Vide:
82-15

Counsel for petitioner: Moss, Wayne Stuart

Counsel for respondent: Zeegers, Donna

Entry	Date	Note	Proceedings and Orders
1	Jan 31 1983	G	Petition for writ of certiorari filed.
3	Feb 17 1983		Order extending time to file response to petition until March 11, 1983.
4	Mar 11 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Mar 11 1983		Brief of respondent Richard Thornton in opposition filed.
6	Mar 16 1983		DISTRIBUTED. April 1, 1983
7	Apr 4 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Apr 4 1983		Petition GRANTED. The case is consolidated with No. 82-15, Oliver v. United States, and a total of one hour is allotted for oral argument. *****
9	Apr 20 1983	G	Motion of respondent for appointment of counsel filed.
10	Apr 20 1983		DISTRIBUTED. May 12, 1983. (Above motion)
11	May 16 1983		Motion for appointment of counsel GRANTED and it is ordered that Donna L. Zeegers, Esquire, of Augusta, Maine, is appointed to serve as counsel for the respondent in this case.
13	May 13 1983		Order extending time to file brief of petitioner on the merits until May 26, 1983.
14	May 18 1983		Brief amicus curiae of State of Alabama, et al. filed.
15	May 26 1983		Joint appendix filed.
16	May 26 1983		Brief of petitioner filed.
17	Jun 2 1983		Record filed.
18	Jun 2 1983		Certified original record received.
19	Jun 4 1983	G	Motion of petitioner in No. 82-1273 for divided argument filed.
21	Jun 10 1983	G	Motion of petitioner in No. 82-15 for divided argument filed.
23	Jun 16 1983		Order extending time to file brief of respondent on the merits until July 10, 1983.
24	Jun 20 1983		Motion of petitioner in No. 82-15 for divided argument GRANTED.
25	Jun 20 1983		Motion of petitioner in No. 82-1273 for divided argument GRANTED.
28	Jul 11 1983		Brief of respondent Richard Thornton filed.
29	Aug 4 1983		CIRCULATED.
30	Sep 21 1983		SET FOR ARGUMENT. Wednesday, November 9, 1983. This case is consolidated with No. 82-15. (2nd case) (1 hour)
31	Oct 26 1983	X	Reply brief of petitioner Maine filed.
32	Nov 9 1983		ARGUED.